VOLUME XLI NUMBER 2

Massachusetts Law Quarterly

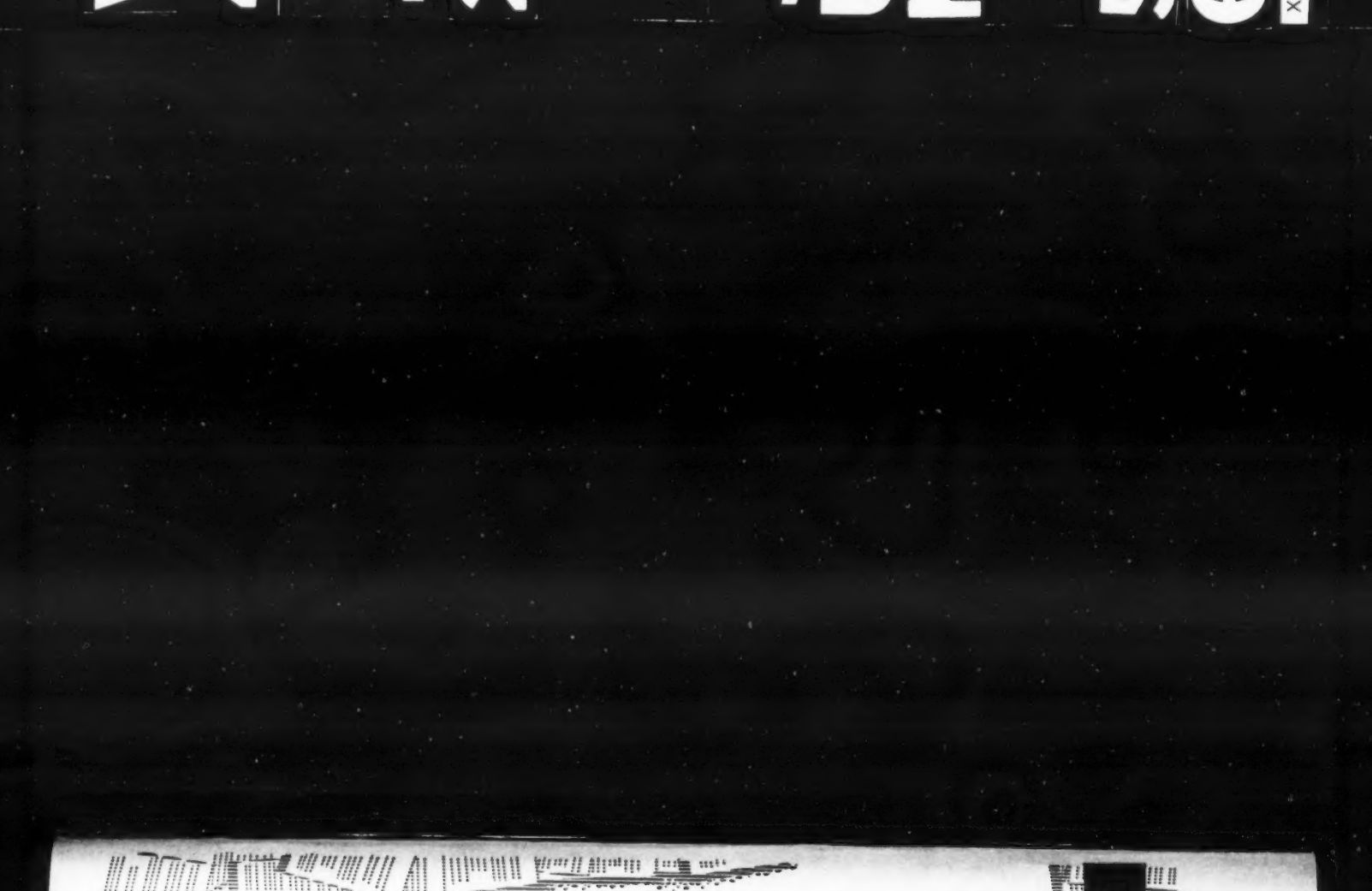
JUNE, 1956

(For Complete Table of Contents see Page 1)

NOTICE OF THE
FORTY-FIFTH ANNUAL MEETING
in Plymouth, June 16, 1956

Report of Nominating Committee
Proposed Amended Bylaws

Issued by the Massachusetts Bar Association
15 Pemberton Square **Boston 8, Massachusetts**



Massachusetts Law Quarterly

Volume XLI JUNE, 1956 Number 2

TABLE OF CONTENTS

NOTICE OF ANNUAL MEETING OF THE MASSACHUSETTS BAR ASSOCIATION

The 45th Annual Meeting of the Massachusetts Bar Association will be held at the Mayflower Hotel, Plymouth, Massachusetts, on Saturday, June 16, 1956, at 2:00 p.m. in connection with the Massachusetts Lawyers' Institute and Convention

To elect officers for the ensuing year;

To consider and act on revised Bylaws as recommended by the Board of Delegates, copy of which appears in the June, 1956 issue of the MASSACHUSETTS LAW QUARTERLY;

To consider and act on a recommendation to be made by the Executive Committee to increase the annual dues which are now seven dollars and fifty cents ($7.50) for senior membership and two dollars ($2.00) for members who have been at the bar for less than three years;

To receive reports of committees and any other business.

In accordance with the Bylaws, the report of the Nominating Committee accompanies this notice.

FRANK W. GRINNELL, *Secretary*

REPORT OF NOMINATING COMMITTEE

The committee herewith submits its nominations for officers and members at large of the Board of Delegates of the Massachusetts Bar Association to fill vacancies that will exist at the annual meeting to be held on June 16, 1956.

President

JOSEPH SCHNEIDER, Brookline

Vice-Presidents

RAYMOND F. BARRETT, Quincy
WALTER J. DONOVAN, Adams
CHARLES S. BOLSTER, Cambridge
LIVINGSTON HALL, Concord
THOMAS M. A. HIGGINS, Lowell

Treasurer

GERALD P. WALSH, New Bedford

Secretary

FRANK W. GRINNELL, Boston

Members at Large — Board of Delegates

MILTON J. DONOVAN, Springfield
ANNA E. HIRSCH, Dedham
JAMES H. FITZGERALD, Brockton
RICHARD B. JOHNSON, Swampscott
JOHN J. FOLEY, Lynn
FRANK L. KOZOL, Brookline
LAURENCE H. LOUGEE, Worcester

Respectfully submitted,

ROBERT W. BODFISH
GERSHON D. HALL
MICHAEL CARCHIA
RICHARD WAIT
LEE M. FRIEDMAN, *Chairman*

CHARTER OF THE ASSOCIATION

[In 1911 the Massachusetts Bar Association, which had been organized in 1909 as a voluntary association, was incorporated.]

CHARTER.

The Commonwealth of Massachusetts.

BE IT KNOWN that whereas ALFRED HEMENWAY, CHARLES E. WARE, ROBERT HOMANS, WILLIAM H. NILES, ROBERT A. KNIGHT, WILLIAM H. DUNBAR, HOLLIS R. BAILEY, LEE M. FRIEDMAN, FREDERICK N. WIER, PAUL R. BLACKMUR, T. HOVEY GAGE, HENRY H. BAKER, ROBERT G. DODGE, JAMES R. DUNBAR, JAMES H. VAHEY, PATRICK M. KEATING, JAMES M. SWIFT, JOSEPH B. WARNER, JAMES E. COTTER, SAMUEL K. HAMILTON, HERBERT PARKER, ALDEN P. WHITE, JOHN C. HAMMOND, WILLIAM H. BROOKS, CHARLES E. HIBBARD, RICHARD W. IRWIN and FREDERICK L. GREENE have associated themselves with the intention of forming a corporation under the name of the

MASSACHUSETTS BAR ASSOCIATION,

for the purpose of cultivating the science of jurisprudence, of promoting reform in the law, of facilitating the administration of justice, of furthering uniformity of legislation throughout the Union, of upholding the honor of the profession of law, and encouraging cordial intercourse among the members of the Massachusetts Bar; and have complied with the provisions of the statutes of this Commonwealth in such case made and provided, as appears from the certificate of the President, Treasurer, Clerk or Secretary, and Executive Committee of said corporation, duly approved by the Commissioner of Corporations and recorded in this office:

NOW, THEREFORE, I, ALBERT P. LANGTRY, Secretary of the Commonwealth of Massachusetts, DO HEREBY CERTIFY that said ALFRED HEMENWAY, CHARLES E. WARE, ROBERT HOMANS, WILLIAM H. NILES, ROBERT A. KNIGHT, WILLIAM H. DUNBAR, HOLLIS R. BAILEY, LEE M. FRIEDMAN, FREDERICK N. WIER, PAUL R. BLACKMUR, T. HOVEY GAGE, HENRY H. BAKER, ROBERT G. DODGE, JAMES R. DUNBAR, JAMES H. VAHEY, PATRICK M. KEATING, JAMES M. SWIFT, JOSEPH B. WARNER, JAMES E. COTTER, SAMUEL K. HAMILTON, HERBERT PARKER, ALDEN P. WHITE, JOHN C. HAMMOND, WILLIAM H. BROOKS, CHARLES E. HIBBARD, RICHARD W. IRWIN and FREDERICK L. GREENE, their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of the

MASSACHUSETTS BAR ASSOCIATION,

with the powers, rights and privileges, and subject to the limitations, duties and restrictions, which by law appertain thereto.

WITNESS my official signature hereunto subscribed, and the Great Seal of the Commonwealth of Massachusetts hereunto affixed, this twenty-first day of June in the year of our Lord one thousand nine hundred and eleven.

ALBERT P. LANGTRY,
Secretary of the Commonwealth.

MASSACHUSETTS BAR ASSOCIATION
PROPOSED AMENDED BYLAWS

RECOMMENDED BY THE BOARD OF DELEGATES FOR CONSIDERATION AT THE 45TH ANNUAL MEETING

ARTICLE I

NAME

The name of this Association, which was duly incorporated under the laws of the Commonwealth of Massachusetts in 1911, is the Massachusetts Bar Association.

ARTICLE II

PURPOSES

This Association was incorporated and exists for the purpose of cultivating the science of jurisprudence, of promoting reform in the law, of facilitating the administration of justice, of furthering uniformity of legislation throughout the Union, of upholding the honor of the profession of law, and encouraging cordial intercourse among the members of the Massachusetts Bar.

ARTICLE III

MEMBERSHIP

Section 1. Any member of the Bar of the Commonwealth of Massachusetts who is in good standing shall become a member of this Association upon filing a written application with the Secretary and making payment of the Association dues for the current year.

Section 2. There shall be a Committee on Membership to consist of the President, the Treasurer and the Secretary, who shall have full authority to determine all questions of eligibility for membership.

Section 3. Each person shall continue to be a member of the Association until death, disbarment, expulsion or resignation.

Section 4. The expulsion of a member, other than for nonpayment of dues, shall be only upon recommendation of the Executive Committee for cause after such hearing as said Committee may determine, and a vote in favor by two-thirds of the members present and voting at a meeting of the Board of Delegates duly called for such purpose.

Section 5. The Judges of the United States Courts located in this Commonwealth, the Justices of the Supreme Judicial Court, the Justices of the Superior Court, the Judges of the Land Court, and the Judges of the Probate Courts shall be Honorary Members of this Association, and shall be exempt from dues. Other honorary members may be elected by the Association.

ARTICLE IV

Affiliation

Any bar association in the Commonwealth which signifies its desire to affiliate with this Association, by certificate of its secretary duly authorized by vote of its governing board, subject to the approval of the Executive Committee of this Association, may become an affiliated association. Such approval of the Executive Committee shall be in writing and filed with the Secretary. Such affiliated association shall pay to this Association annual dues of twenty-five ($25.00) dollars payable to the Treasurer on the first of January of each year as provided in Article XVI, and so long as it is not in default with respect to this payment, it may send a delegate to the meetings of the Board of Delegates of this Association, with privileges of voting.

ARTICLE V

Officers

The officers of the Association shall be a President, two or more Vice-Presidents as hereinafter provided, a Secretary, and a Treasurer. The officers shall be elected annually, at the annual meeting of the Association, for terms of one year each and until the close of the meeting at which their respective successors shall have been elected.

ARTICLE VI

President

The President shall preside at all meetings of the Association, and shall be Chairman of the Board of Delegates and Chairman of the Executive Committee. No person shall be eligible for election to the office of President for more than two successive annual terms. The President shall appoint all standing committees, and such other committees as the Association, the Board of Delegates, or the Executive Committee may direct. He may, from time to time, appoint special committees, and shall report such appointments to the Executive Committee at its next meeting. He shall designate the Chairman of each committee provided for in this article, and shall fill all vacancies.

ARTICLE VII

Vice Presidents

Section 1. The number of Vice Presidents to be elected at each annual meeting of the Association shall be determined by the Executive Committee, not later than the first day of February in each year, provided that there shall be not less than two (2) nor more than five (5) Vice Presidents. After the 1956 Annual Meeting, no

person shall be eligible for election to the office of Vice President for a fourth successive term.

Section 2. In the absence or disability of the President the Vice President designated by the President or, in default of such designation, by the Executive Committee, shall perform the duties of the President.

ARTICLE VIII

Board of Delegates

Section 1. There shall be a Board of Delegates which shall consist of the President, the Vice Presidents, the Treasurer, the Secretary, the Assistant Secretary as hereinafter provided in Article XII, the five most recent living former Presidents of the Association, such members of the Executive Committee as are not otherwise members of the Board, the delegates from the affiliated associations, and seven (7) members elected at large from the membership of the Association at the Annual Meeting of the Association, for terms of one year each.

Section 2. The control and administration of the Association shall be vested in the Board of Delegates, subject to the paramount power and authority of the members of the Association in annual or special meeting assembled.

Section 3. The Board of Delegates shall meet no less than three times a year, at such times and places as may be determined by the President or by the Board.

ARTICLE IX

Executive Committee

Section 1. The Executive Committee shall consist of the President, the Vice-Presidents, the Treasurer, the Secretary, and seven (7) members elected by the Board of Delegates, five (5) of whom shall be members of the Board of Delegates and two (2) of whom shall be members of the Association who are not otherwise members of the Board of Delegates.

Section 2. Subject to the paramount power and authority of the members of the Association in annual or special meeting assembled, and of the Board of Delegates, the Executive Committee shall be the administrative committee of the Association between meetings of the Board of Delegates, and shall have the power and authority to do and perform all acts and functions which the Board of Delegates itself might do or perform.

Section 3. The Executive Committee shall meet no less than six (6) times a year, at such times and places as the President may direct, or as the Executive Committee may determine.

ARTICLE X

Treasurer

Section 1. The Treasurer shall collect and, by order of the Association, the Board of Delegates or the Executive Committee, shall disburse the monies of the Association. He shall keep proper books of account, make reports to the Annual Meeting of the Association, and, from time to time, to the Executive Committee, and to the Board of Delegates whenever so required. He shall discharge such other duties as may be required of him by the President, the Association, the Board of Delegates or the Executive Committee.

Section 2. The Treasurer shall, at the expense of the Association, give a surety company bond for the proper performance of his duties in such sum and in such form as shall be required by the Board of Delegates or by the Executive Committee.

Section 3. The Treasurer's report shall be audited annually, before the presentation to the Association, by two members of the Executive Committee to be appointed by the President, or by a Certified Public Accountant, in each case as the Executive Committee may direct.

ARTICLE XI

Secretary

The Secretary shall keep a record of all proceedings of the Association, and shall notify officers and members of committees of their election or appointment. He shall issue the notices of all meetings, and shall keep the seal of the Association. He shall discharge such other duties as may be required of him by the President, the Association, the Board of Delegates, or the Executive Committee. The Secretary shall have all the powers and the title of Clerk.

ARTICLE XII

Assistant Secretary

An Assistant Secretary shall be elected by the Board of Delegates to assist the Secretary and to perform such other duties as the Board of Delegates or the Executive Committee shall direct. In the absence or disability of the Secretary, the Assistant Secretary shall have all the power and authority and shall perform the duties of the Secretary. The Assistant Secretary may attend all meetings of the Board of Delegates and of the Executive Committee, and when so attending shall be a member thereof with the right to vote.

ARTICLE XIII

Standing Committees

Section 1. There shall be the following standing committees to be appointed annually by the President and announced by him at the first meeting of the Board of Delegates following his election.

(1) *Legal Education.* It shall be the duty of this Committee to consider and report matters pertaining to legal education and admission to the Bar, so that high standards of legal attainment, and character in the profession shall be encouraged. This committee shall consist of not less than three (3) nor more than nine (9) members.

(2) *Grievances.* This committee may receive and hear complaints preferred against any member of the Bar for alleged misconduct in his profession, provided the same be in writing, plainly and specifically stating the matter complained of, and subscribed by the complainant, under oath if required. This committee, in its discretion, may investigate alleged or apparent misconduct in the profession by a member of the Bar, of which no formal complaint has been made. With the approval of the Executive Committee this committee may take such action, in the name of the Association, as it shall deem to be just and proper. This committee shall consist of such number of members as the Executive Committee, from time to time, shall determine, and may prescribe rules governing its own conduct.

(3) *Legislation.* This committee shall follow legislation affecting matters included in the purposes of the Association. It shall advise the Executive Committee concerning action to be taken by or on behalf of the Association regarding legislation and may, from time to time, recommend legislation to be introduced. This committee shall consist of such number of members as the Executive Committee from time to time shall determine.

(4) *Unauthorized Practice of Law.* This committee shall investigate instances of alleged unauthorized practice of law. It shall recommend to the Executive Committee any action to be taken concerning the same. This committee shall consist of such number of members as the Executive Committee from time to time shall determine.

(5) *Public Relations.* This committee shall concern itself with ways and means of improving the relationship between the Bar and the general public, the understanding by the public of the service of lawyers to the welfare of the community, and their efforts to elevate the standards of the profession. It shall seek to make known to the public the importance of the courts, of the administration of justice, and of our constitutional mode of government. This committee shall consist of not less than three (3) nor more than nine (9) members.

Section 2. If the President shall fail to name any such standing committees or any of them by November first of any year, the Executive Committee shall name the committee and shall designate the Chairman thereof. Any vacancy in any committee shall be filled promptly by the President or, upon his default, by the Executive Committee.

ARTICLE XIV

Nominations

Section 1. On or before February 15th in every year at a meeting duly called for the purpose, the Board of Delegates shall elect a nominating committee of five (5) members, and shall designate the Chairman thereof. Not later than April 1st the nominating committee shall file with the Secretary its nominations for President, Vice-Presidents, Treasurer, Secretary and seven (7) members at large of the Board of Delegates. The report of the committee, together with this Article, shall be mailed to the members not later than April 15th. Other nominations in writing may be made for any of such offices upon the signature of not less than fifty (50) members of the Association, provided such nominations are filed with the Secretary not later than May 1st. All nominations shall be contained in the notice of the Annual Meeting, those nominated by petition being so designated. No person shall be elected unless nominated as herein provided.

ARTICLE XV

Quorum

At any meeting of the Association a quorum shall consist of not less than fifty (50) members. At any meeting of the Board of Delegates a quorum shall consist of not less than ten (10) members of the Board. Four (4) members shall constitute a quorum of the Executive Committee and of any other committee consisting of six (6) or more members. A majority shall constitute a quorum of any committee of less than six (6) members. It shall require the affirmative vote of not less than a majority of any such quorum to effect any proposed action, motion, resolution or vote.

ARTICLE XVI

Dues

Section 1. The annual dues shall be seven dollars and fifty cents ($7.50) payable to the Treasurer on the first of January of each year, except that such dues for persons who have been members of the bar for less than three calendar years shall be two dollars ($2.00).

Section 2. Any member in arrears for more than one year may be dropped from the roll of membership by order of the Executive Committee.

ARTICLE XVII

Sections

Section 1. The Board of Delegates may establish such Sections within the Association as may be desired, and may combine, restrict, regulate or discontinue any Section so established.

Section 2. Membership in a Section shall be restricted to members of the Association in good standing who shall also fulfill the membership requirements of the by-laws of the Section.

Section 3. A Section shall not represent the Association except by specific authority from the Board of Delegates, or from the Executive Committee, in each case. Nor shall any proceedings of any Section be published without the approval of the Board of Delegates or the Executive Committee.

ARTICLE XVIII

MEETINGS

Section 1. The Annual Meeting of the Association shall be held at such time and place in the month of June of each year as the Board of Delegates or, in default thereof, the Executive Committee, shall determine. At least twenty days' notice of such meeting shall be given to the members of the Association as provided by these by-laws. Such notices shall specify the matters to be brought before the meeting as ordered by the Board of Delegates or the Executive Committee, or as requested by any member in accordance with this Article.

Section 2. Any matters comprehended within the purposes of this Association or affecting the Bar of Massachusetts may be brought before the annual meeting for action or for an expression of the sense of the meeting. But no vote shall bind the officers, or the Association as a whole, nor purport to do so, unless the subject matter incorporated in such vote was first included in the notice of the meeting in a form reasonably sufficient to indicate to the members the matter to be considered. Any member desiring to have any matter presented to the Association shall not later than May 1st submit the same in writing to the Secretary in brief form reasonably satisfactory for inclusion in the notice of the Annual Meeting to the members.

Section 3. A copy of Section 2 of this Article XVIII shall be published in the MASSACHUSETTS LAW QUARTERLY, or otherwise distributed to the members, at least sixty (60) days in advance of the Annual Meeting, but the failure of the Secretary to so publish or distribute shall not suspend or negate the operation or effect of such Section 2.

Section 4. Special Meetings may be called at any time by the President, by the Board of Delegates or by the Executive Committee, and shall be called by the Secretary upon written request of fifty (50) members, specifying the purpose thereof. At least seven (7) days' notice of the time, place and purpose of any such special meeting shall be given the members. At any such special meeting only matters set forth in the notice thereof shall be considered.

Section 5. All notices of meetings of the Association shall be sent to each member at his last address shown upon the records of the Association. Such notices shall be sent by the Secretary or, upon his failure, refusal or neglect to do so, by the Assistant Secretary, or upon his failure, refusal or neglect to do so, by any interested member of the Association.

ARTICLE XIX

ELECTIONS

The officers and members at large of the Board of Delegates shall be elected by ballot at each Annual Meeting, as in these Bylaws provided. All persons so elected shall hold their offices from the close of one Annual Meeting until the close of the succeeding Annual Meeting, and thereafter until their respective successors are elected. Any vacancy in any office, and in the Board of Delegates, and in the Executive Committee shall be filled by the Executive Committee.

ARTICLE XX

AMENDMENT OF BYLAWS

These Bylaws may be amended, altered or repealed, or an entirely new set of Bylaws may be substituted herefor, in each case, by a vote in favor of such proposed action by not less than two-thirds of the members present and voting at any Annual Meeting, or at a special meeting called for the purpose, provided that at least fifty (50) members are present. Notice of any such proposed action, reasonably sufficient to indicate to the members the nature and purpose thereof, shall be contained in the call of such Annual or special meeting.

FIFTEENTH MASSACHUSETTS LAWYERS' INSTITUTE AND CONVENTION

at the newly enlarged and redecorated

MAYFLOWER HOTEL, PLYMOUTH (Manomet Point)

All lawyers, whether members of the Association or not are cordially invited—wives (and husbands) included. Registration fee, $3.00. Chairman, GEORGE F. GARRITY; Co-Chairmen, THOMAS W. PRINCE and RAYMOND F. BARRETT. Make your reservations early!

Program for Friday, June 15, 1956

Greetings from

PRESIDENT JOSEPH SCHNEIDER

12:15 Buffet Luncheon as guests of the Association

2:30 to 5:00 LABOR AND MANAGEMENT PROBLEMS — *a symposium.* HON. STEPHEN S. BEAN, *Presiding—Member,*

National Labor Relations Board; PROF. ARCHIBALD COX, Harvard Law School, "What Is the Law Today?"; KENNETH J. KELLEY, *Sec.-Treas. and Legislative Agent,* Massachusetts Federation of Labor, "The Point of View of Unions"; LEON J. KOWAL, prominent Boston lawyer, "The Point of View of Management"; SAUL WALLEN, well-known arbitrator, "The Role of the Arbitrator".

5:30 to 6:00 . . . or a view of the ocean (Dutch treat)

6:30 to ? CLAMBAKE—such as you have never seen, felt or tasted! To be followed by a huge bonfire around which we will in *ye olde manner* entertain ourselves. Guaranteed to bring you back to your salad days and to make you 15 years younger. *(Dungarees and Denims)*

Song Fest — Stunts — Skits — Fireworks

Program for Saturday, June 16, 1956

10:00 MR. DISTRICT ATTORNEY—THOMAS W. PRINCE, *Presiding*—a panel of 5 or 6 Massachusetts D.A.'s

11:00 CHARLES D. POST, noted in the field, discusses "Recent Developments in Estate Planning and Income Tax Law."

11:00 JUNIOR BAR CONFERENCE—ROGER J. DONAHUE, *Chairman.* PHOTOGRAPHY IN THE COURTROOM . . . a panel discussion.

12:15 Luncheon

2:00 *Forty-fifth* ANNUAL MEETING OF THE MASSACHUSETTS BAR ASSOCIATION. (See notice with proposed by-laws and other matters for consideration, pages .... of this issue.)

5:30 Cocktails—or another look at the ocean (same arrangements).

7:00 INSTITUTE DINNER. *Greetings*—HONORABLE STANLEY E. QUA. Address by HONORABLE LUTHER W. YOUNGDAHL, *Judge of the United States District Court for the District of Columbia.*

LADIES COMMITTEE—*Chairman,* MARGERY F. BARRETT; *Co-Chairmen,* LOUISE A. PRINCE, HELENE S. GARRITY.

A full and interesting program is being worked out which is sure to please milady.

THE FUTURE OF THE TRIAL LAWYER

An address by Hon. David W. Peck, Presiding Justice of the Appellate Division of the Supreme Court of New York, First Department at the Regional Meeting of the American Bar Association for lawyers in the New England States and New York in April, 1956 at Hartford.

Among the vivid memories of any lawyer will be pithy comments of law school professors. Some of these gems lodge as firmly in the mind as the major points of a course. I remember well such an aside from Professor Edward H. Warren—a pause in a discussion of principles of Corporation Law to comment on personalities at the bar, ending with the observation that "The Daniel Webster type of trial lawyer is as dead as a door nail."

During the intervening 30 odd years, I have often recalled that observation and wondered if the trial lawyer, like his illustrious prototype, was not fading from the scene.

Anomolous as it is, the last three decades, the period of greatest growth in the law and law practice, have witnessed a decline approaching evaporation in trial practice save in the single area of personal injury litigation.

Office practice has grown apace with the amazing growth of business on the commercial and industrial fronts. Commercial controversies have similarly increased, but they have not gone to court. Businessmen have set up their own tribunals for the adjudication of their disputes and withdrawn almost completely commercial litigation from the courts.

Widened government regulation of business and all relationships has given rise to whole new bodies of law and a greatly increased demand for judicial processes to protect the rights and apply the remedies created. But the regular judicial establishment, except for a limited review of administrative decisions, has not been vested with the new jurisdiction. Instead, each new venture into regulation has been accompanied by the creation of a commission, not only to administer the law but also to exercise the corollary judicial power. The judicial function has been made an adjunct and auxiliary of the administrative agency.

So gradual but constant has been the erosion of the courts that the bar has hardly seemed conscious of it, and certainly the profession has not taken measures to prevent the inroads or reverse the process. Whether this is because the profession has been content with its expanding opportunities in other fields or has become convinced that the courts and the judicial process are no longer suitable media for the resolution of controversy, I do not know. But the fact is that every move of legal business in any direction has been away from the courts, and the accumulated effect has been to reduce the courts in most jurisdictions to little more than a forum for handling negligence cases.

The reasons for vesting the judicial function in administrative bodies were supposedly the need for experts or specialists in the subject, in a judicial as well as in an administrative capacity, and the need for speed in determinations. The courts were deemed inadequate and deficient both in the special expertness thought to be required and in the pace of procedure associated with the ordinary judicial process.

So, out of a sense of expediency, we virtually abandoned one of the fundamentals on which our government was founded—the separation of judicial and executive powers—and sacrificed the quality of independence in the judicial service attached to administrative agencies.

To the charge that the traditional judicial process, as we have practiced it, is slow, cumbersome and dilatory, a plea of guilty would have to be entered. It is quite understandable that when Congress was faced with the need of establishing procedures to carry out the mandates of new laws dealing with the complexities of modernity, where time was of the essence, that it should have turned away from the courts and created more streamlined procedures.

What is surprising is that the question does not appear to have been asked, whether the courts or some truly judicial body could be made to function adequately and speedily enough to meet the requirements. It seems to have been a foregone conclusion that courts could not so function and that some administrative substitute would have to be found.

How great the conviction and provocation must have been that, to overcome the slow motion of the judicial process, it was scuttled and made an arm of the administrative—no longer part of an independent branch of government, but a dependent branch of an executive department.

It should have been obvious from the beginning as it has been obvious to any objective observer since that a judicial service, so attached to an administrative agency, is not a judicial service at all. It lacks the essential independence of judiciality. It cannot command the talents of men of judicial stature. It does not accord them the dignity, standing, independence or compensation befitting the judiciary. Trial Examiners, the administrative substitute for a judge, are in law and fact subordinates of the executive power and their judgments are bound to be molded, if not dictated, as they may be overruled, by their superior.

That a form of appeal is allowed to the courts is scant compensation or correction for the condition which has been created. The administrative judgments have been endowed with such presumptive authority and allowed to stand on such slight support that ultimate judicial review is a protection only against gross error and flagrant abuse.

Fortunately, late as it is, it is not too late to correct the condition and place essentially judicial service on a truly judicial base.

The opportunity is presently at hand, in the report of the Hoover Commission, backed by the American Bar Association, recommending that an administrative court be created to exercise the judicial function associated with administrative law. This was the recommendation of the Task Force on Legal Services and Procedures of the Hoover Commission—that the trial examiner system connected with administrative agencies be abolished and that an independent court, a branch of the judicial system, be established to perform the judicial function.

Creation of such an administrative court would give recognition to the presumed need for special expertness in the administrative fields. I say presumed, because it has not been demonstrated, and personally I doubt the validity of the thesis, that a judge will be a better judge for being narrowly confined to one field of the law and becoming a so-called specialist or expert in that field. But, if it is necessary to serve that fetish in order to gain an independent judicial service in the wide area of administrative law, it is worth while. The important aim is to establish on a judicial footing the exercise of the judicial function wherever it is called for. That should be a firm and immediate objective of the organized bar.

But something more than pious pronouncements on the virtues of an independent judiciary will be required to carry the argument. We must be able to assure an affirmative answer to the question of whether courts can operate with a directness and dispatch to handle a high volume of cases with high speed. Admittedly, the judicial juggernaut will have to be stripped down and speeded up if it is to carry the load and keep to any proper schedule.

It is more than coincidental that, at the same time that extrajudicial proceedings in the administrative field were growing up outside of the courts, the courts were losing their regular custom. The very feelings which prompted the creation of administrative procedures prompted businessmen to create other forums to handle their controversies. Court proceedings were found to be too slow and expensive to meet commercial needs. Arbitration tribunals were the commercial community's device to meet its requirements.

There is the closest connection between the two developments or movements on the administrative and commercial fronts. Both were born of the same circumstances and convictions—a dissatisfaction with the courts and the traditional judicial process as means of trying and resolving controversies.

In consequence, the courts have been left only with personal injury suits as the bulk of their work and there is a growing agitation to take that business from the courts and place it in a compensation board. Dissatisfaction with the court's handling of this litigation is no less than with their handling of commercial cases, and it is undoubtedly true that the only reason that personal injury cases have not been removed from the courts is that there is no

organization or community of injured plaintiffs, similar to chambers of commerce or boards of trade, to give impetus to the movement to find another and different forum. But there is an increasing public consciousness of court failure even in this area, and a growing sentiment in favor of a system of compensation which is surer, swifter and less costly than court proceedings. When public servants of the prominence and influence of Chief Judge Clark of the United States Court of Appeals and Governor Meyner of New Jersey advocate a compensation system in automobile cases, the profession should read the writing on the wall.

The plain fact is that courts can hardly survive as a major institution, much less regain lost ground or add new dimensions, unless court procedures are simplified and expedited and the whole judicial process adapted to handling a much greater volume of business in less time at lower costs.

The question necessarily presses itself uponus —is it worth while to try to save the courts or extend their jurisdiction? Are courts and court processes hopelessly out of date?

In my opinion there are sound values in court concepts and court standards. There is a belated but recent awakening to those values—the importance of independence in the exercise of the judicial function, the vital importance of rights of confrontation and cross-examination, the reason for rules of evidence, all contributing to the essential integrity of judicial judgments. There are not substitutes for these mainstays of justice. Every excision is a whittling away of justice.

These values are not out of date. They are as vital today as ever. It is not any re-evaluation of the fundamentals of the judicial process which is called for, but rather a re-examination of court procedures to see if changes cannot be made which will enable the courts to accommodate the larger volume of business with due dispatch and still preserve the essential values of the judicial process.

I am convinced that court services can be made timely, economical and efficient. All that is required is some change in mechanics, and principally a change in attitude and habits. It is the human equation rather than the mechanical equation which is to blame for the slow processes of the law. From beginning to end, the course of a lawsuit is slow, but that is because the participants make it so.

Our pleading process is the first block as well as the first step in litigation. Inherently it is dilatory, but practice has made it so. Too often a complaint and answer do not draw an issue, but motions to amplify the pleadings or make them more definite and certain are necessary to reach a clarification of the issues. Months are usually consumed in the pleading process, with more issues raised or feigned than actually exist, or with more concealed than is disclosed. Not until a pre-trial conference or frequently until the trial do the issues get reduced to the real controversy.

This pleading practice scarcely serves its purpose, but it involves a large investment and almost as large a waste of professional time. It consumes a large space of calendar time and constitutes a substantial delay at the threshold of a case. This delay and waste could easily be avoided by lawyers sitting down together at the outset, as they will have to do later at a pre-trial conference, and frankly discussing the claims and defenses and drawing the issues.

Why is this not done? It is not done because the adversary concept and feeling so possess counsel that the very pleading process becomes a blocking operation. Nothing is accomplished by such maneuvering. It can only delay the inevitable. The issues will emerge eventually. All the time spent in not going directly to the heart of the matter is irretrievably lost.

A much better professional practice, and one more consonant with the interest of the parties, would be to start a case not with litigation but with conversation. What should be litigated is the issues drawn and not the drawing of issues. Regardless of the heat generated by clients between themselves, lawyers should be able to meet on a professional plane and frame the issues. In so doing, they would also effect many an earlier settlement.

That battling out the pleadings is no essential part of the litigating process is manifest from experience with arbitration. Whatever may be said against arbitration as a substitute for a trial court, it has one advantage which has been universally accepted and acclaimed by the participants in arbitration, that is the simple statement of issues and inauguration of a proceeding. Little time is lost in preliminary paper work. It would not be true to say that businessmen seek arbitration for this simplicity, expedition and economy alone. But it is a measure of what they seek and get in the tribunals of their own creation.

With a conviction that a sound start can be made in simplifying and expediting the litigation process by compacting the pleadings into a single statement or submission, as in arbitration, the Judicial Conference of the State of New York recommended to the last session of the Legislature, and the recommendation was enacted into law, a simplified procedure for drawing the issues. The new law permits the parties to commence an action without a summons or pleadings by joining in a single statement of the claims and defenses and relief requested. That is all that is required to formulate a case. Upon filing the statement the case is at issue. The Conference, speaking for all the courts of the state, has also promised litigants who adopt the new procedure that the courts will set a trial date by appointment with the parties.

The actual trial of a law suit, unless it be a jury trial, is the least time consuming part of litigation. It is the trial preliminaries or waiting for a trial to be reached which consume time—months and even years.

The courts of New York State have now at least made available the means of saving that lost time. They have brought expeditious procedure within reach of the parties. The bar can now say to the business community that it can handle within the court frame any controversy as expeditiously and economically as it can be handled in arbitration. Many businessmen may still prefer arbitration. But arbitration has not proved to be an unmixed blessing and many businessmen will prefer the benefit of law if they can have it at no extra burden or expense.

The bar has a legitimate opportunity to enlarge its field of service by making known what it has to offer. Arbitration is a useful institution. There should be no professional war on it. Competition between arbitration and court litigation is healthy. Arbitration certainly competes with the courts. The misfortune is that the courts and bar have defaulted in the competition. The time has come to re-establish the competition by bringing court services in line with the public demand for an expeditious and economical trial process. The way is at hand—the question is, Is the will there?

As I have said, the trial process itself, when not encumbered by a jury, is not slow. There is seldom ground for complaint about the length of time it takes to reach or try an equity case. Delay is almost entirely in the jury trial of cases.

I will not undertake to introduce into this discussion the merits of jury trials. My own observations, for what they are worth, made over a period of thirteen years as a trial and appellate judge, are that jury verdicts are generally fair judgments upon a case. I have not noticed any difference in results between trials before a court without a jury and a jury trial. Indeed, all the statistical evidence available, from enough jurisdiction to constitute a fair sampling, indicates approximately the same results either way, both in the percentage of plaintiff's and defendant's verdicts and in the amounts awarded.

The notion which seems to persist that a plantiff will fare better before a jury is a false notion. It may be that a jury will take a greater liberty with the rule of contributory negligence and that occasionally a jury may be led into an undeserved verdict. But the gamble on hitting the jackpot, including the risk of not holding it on appeal, is not a reasonable guide in the choice of tribunals. When there is added to the gamble, the delay in getting to trial and obtaining the judgment, with the attendant risks of missing witnesses and miscarriages of justice, the considerations in favor of a jury trial are not impressive.

The point I will make is that the slow process of jury trial constitutes a bottleneck and is the cause of all the delay which has come to characterize the courts and brand the courts in public estimation as dilatory. It is the jury system which is principally responsible for the flight of commercial litigation from the courts. Businessmen will not put up with it. The jury system, because it is

the root of delay, is responsible for the current agitation for a compensation system in automobile accident cases. And certainly no new business will be placed in the courts if it must go through the jury process.

I have been told that many lawyers feel aggrieved by my comments on the jury system and regard such thoughts as a threat to their livelihood. I would indeed be disturbed if there were any basis for such a feeling. Considering the fact that it takes three times as long to try a case before a jury as before a judge without a jury, and the long delay involved in waiting for cases to come to trial, all resulting in a multiplied consumption of lawyers' time and corresponding reduction in the number of cases a lawyer can handle, I know that the system of jury trial is as uneconomic professionally as it is uneconomic to the parties and the public. Indeed, if the profession will face the facts realistically, it will come to the conclusion that it is the system of jury trials, rather than the elimination of jury trials, which is the threat to the trial lawyer, and that adherence to the jury system in civil cases will as inevitably result in the withdrawal of personal injury cases from the courts as it has resulted in the withdrawal of commercial litigation from the courts.

The paradox is that we are not really employing the jury system in the disposition of cases. The assumption that we are maintaining the jury system is an illusion. The fact is that no significant number of cases can be tried by juries as compared with the tremendous volume of accident cases in the courts. The only way cases can be disposed of and a complete breakdown of court services avoided is by avoiding jury trials. So the cases get settled, 96% of them, as they must be settled. That is good, but settlements should be made on the merits and not under the compulsion of having to wait years for trials or because the trial machinery is not adequate to handle the trial load.

The number of completed jury trials in any court is infinitesimal. In the County of New York, for example, the busiest trial court in the world, 132 jury verdicts were taken last year. Only slightly more than one verdict a judge is taken each month. This does not mean that the judges are not busily engaged all day long. They are. They are engaged in the settlement of cases, either by presiding at settlement negotiations or trying enough of a case to bring about a settlement. This is not trial practice. Nor is it any preservation of the jury system. All we are preserving is the shadow of the jury system as a stalking horse for settlement negotiations. And all we are accomplishing is long postponement at large expense of the inevitable settlements which should be made much earlier at less expense, for the settlement schedule is dictated by the trial schedule and that imposes delay and the cost of delay on the whole case line.

Why then does the profession insist upon maintaining such a system? Plaintiff's attorneys are motivated on the one hand by

fear of the rule of contributory negligence, as it might be strictly observed by a judge, and on the other hand by speculative hopes of doing better in some cases before a jury than before a judge. Insurance companies, although they are increasingly willing and desirous of consummating early settlements, still regard the long delay they can subject a plaintiff to as a bargaining advantage. They also regard the rule of contributory negligence, while of only uncertain substance, as a bargaining point. The bargaining equation is thus the certainty of delay over the uncertainty of result, with the ultimate substitution of a guess on a settlement for a gamble on a trial.

This is not scientific, nor is it rational. If it works out fairly in the end, it is by reason of a complicated system of checks which approximately balance, rather than by reason of any direct, simple or sure adjudicatory process.

If the courts and profession had nothing better to offer, the prospect would be dreadful indeed. But we do have something better to offer, and it is readily at hand and involves no uprooting of the court system and realign the law with reality and justice.

Confining consideration to negligence cases for the moment, for the immediate problem is to hold what we have, we can try all the cases which will be tried before judges without juries promptly and with a fraction of the time and effort which presently go into the trial of cases. The immediate consequence of this simple change would be to bring calendars up to date, eliminate the delay which in the public mind characterizes the law and prejudices the public against the profession, bring about the prompt settlement of cases to the advantage of all concerned, reduce the burden and expense of handling cases, reduce the stress, strain and pressure upon trial lawyers, and enable lawyers to handle many more cases with more ease. I could not be more convinced of anything than I am convinced that if the profession could get onto this professional basis of handling cases it would find practice so much more pleasant and profitable that it would look back with wonder that we had put up so long with a system of travail that so ill-served every professional and public interest.

Of course, at the same time that we shift over to a system of trial by judge, we should change the rule of contributory negligence to one of comparative negligence. No one attempts to defend the letter of the law of contributory negligence. Spokesmen for the insurance industry attempt to defend it in principle as loosely applied in practice. They say that a jury takes approximately the right amount of license or liberty with the law to approximate justice, and that settlements are really based on considerations of comparative negligence. This may be, but it is more of the guess and gamble, and not law.

I do not think that lawyers should rest their case on such a purely pragmatic base. If the letter of the law is out of line

with a sense of justice, and the law must be left to be tempered by lay judgments, then the law should be changed to accord with the community conscience, so that it can be observed and followed in good conscience and not be treated lawlessly.

I think that the insurance industry is as misguided and mistaken in its addiction to the rule of contributory negligence as are plaintiffs' attorneys in their devotion to the jury system. A plaintiff should not recover at all if his own negligence equals the defendant's negligence in causing an accident. But if it is less, a reduced measure of recovery is fair. A law of comparative negligence so framed would be just and practical. It could be rightly and forthrightly applied in accordance with its terms by a judge.

There is no reason to think that the cost overall for underwriting the judgments or settlements resulting from the operation of such a system would be any greater than under the present rigidly defined but loosely applied law. But whatever the cost, if fair and just, the public through the agency of insurance can support it. The public must and does support whatever liability determining system exists. It does so now; it would do so under a compensation system. All that can be asked is that liability be determined by fixed and fair standards, that awards be fair and that the expense of administration be reasonable. A system of determining and assessing liability by a judge under a rule of comparative negligence is certainly fair in principle. There is no reason to think that it would not be fair in practice. And certainly it would be the most economical in administration, both in the public expense of maintaining the court system and in the cost of prosecuting and defending claims. It is also the best assurance against the adoption of a compensation system.

The trial lawyer faces his crisis. But he possesses within himself not only the power of full recovery but of enlarged usefulness. He is presently hemmed in by outmoded professional practices. But the bounds can be burst and the horizon beckons. Opportunities for professional and equal public service lie in so many directions. This is the time for vision, resolution and constructive action.

EDITORIAL NOTE

In connection with this address of Judge Peck and the following extract from the United States Investor we call attention to the discussion of the same problems in the early thirties by the Judicial Council in its 8th and 9th reports. (18 Mass. Law Quarterly No. 1, Nov., 1932 and 19 M. L. Q. No. 1, Nov., 1933).

In the 9th report (p. 16) the Council said:

"A proposal which is being made with increasing frequency to meet the ineffectiveness and the abuse of procedure in automobile cases is to take them all out of the courts and turn them over to

(Continued on Page 52)

WORKMEN'S COMPENSATION TYPE OF AUTOMOBILE ACCIDENT INSURANCE NO LONGER AN IDLE DREAM!

Adoption of Compulsory Law in New York Merely An Advance Warning of Greater Changes to Come in Our Social Thinking in This Country—

Extract from an article by MR. ROGER KENNEY
in the *United States Investor*
of April 21, 1956

(Reprinted by permission)

The moment the New York Legislature passed this compulsory act, the questions should not have been whether the insurance companies can "live with" the act, or whether other states are likely to follow a similar pattern, but rather whether the New York Act doesn't presage some even more drastic changes in this country's approach to the terrifying social problem arising out of the 60 odd million cars being driven at high speed and in an all too careless manner upon our highways.

In this connection, we would call your attention to the fact that what we feared might happen incidental to the passage of a compulsory law in New York is already showing definite signs of happening. As you will recall, we stated in these columns some months ago—when the companies suddenly decided to offer uninsured motorists cover (U.M. Cover) free—that when, as and if a compulsory measure was passed, there would be a strong movement to include such protection in the compulsory legislation.

That this was no idle prophecy is indicated by the fact that the Governor is already talking about the possibility of making some provision in the compulsory act for the extremely broad coverage provided under this U.M. cover. And even more disturbing is the tendency of certain people in the industry to take up the same cudgel on the plea that it will "fill the last gap" in compulsory insurance.

THE CHANGE IN OUR SOCIAL THINKING

Whether this objective will be accomplished through the medium of a state fund or otherwise is a relatively unimportant question when you stop to think of what it indicates in the way of a fundamental change that has been going on of late in our social thinking on this whole question of indemnifying the victims of automobile accidents. We cannot emphasize too strongly here that with the passing of the years, we have paid less and less attention to the question of solving the problem of the financially irresponsible driver within the geographical boundaries of the respective states and more and more attention to indemnifying *any* and *all* victims of automobile accidents beyond those state lines and under prac-

tically all conditions which can be conjured up. To put it succinctly, the watchword now seems to be that with the automobile having become the most mobile vehicle in common usage today—with it no longer being regarded as a luxury but an essential element in our everyday way of life—with the question of fault or negligence becoming more and more difficult to establish because of the crowded condition of our highways the time has come to recognize that just as the adoption of high-speed machinery in the manufacturing world did so much to bring on workmen's compensation in the early 1900's, so will the widespread use of the automobile bring on a system of compulsory automobile compensation insurance in the not too distant future.

The Trend Towards Compensation

Up to now, any mention of a definite trend in this direction has generally been greeted with bland statements to the effect that workmen's compensation is quite unlike automobile compensation—that the close employer-employe relationship in industry permits the beneficial operation of accident prevention programs—that no such close relationship exists between motorists on the highways—that while workmen's compensation is concerned solely with persons earning incomes, persons involved in accidents frequently earn no income—that it would be extremely difficult to draft an equitable schedule of benefits—that the administration of such an act presents a serious problem in that malingering and faked injuries which plague workmen's compensation would create substantially greater problems under an automobile compensation plan. Even though all this be true, however, there is unmistakable evidence that we are working inevitably toward an automobile compensation plan in this country. And we shall be so bold as to prophesy that once any great number of states adopt compulsory automobile liability insurance with the U.M. endorsement attached (or otherwise providing for such cover), the problem of battling automobile compensation plans will loom immediately and more ominously than ever was the case with compulsory insurance itself.

Professor Kuvin's Paper

Lest you think that we are merely jousting at windmills here, we would call your attention to a masterful paper presented at the recent Insurance Law Conference at the University of Miami, Coral Gables, by Herbert A. Kuvin, Professor of Law Training at the School of Law. After a thorough and painstaking discussion of the historical development of the transition from the common law application of the law of employer-employee and the device of insurance as a means of protection for the employer against the application of the legislative enactments which were considered at that time to represent a revolutionary social change, the professor goes on to draw a parallel to the problem now confronting underwriters

of automobile liability insurance. Among other things, he points out that there were recently introduced in both Houses of the Maryland Legislature bills on the subject of automobile compensation insurance. Both bills have as their purpose to amend and supplement the Maryland "Workmen's Compensation" and "Motor Vehicle Codes" to "provide compensation for accidental injury involving a motor vehicle, requiring annual re-registration of all motor vehicle operators contingent on proof of an effective motor vehicle compensation policy, and establishing the 'Uninsured Motorist Fund' for certain claimants financed by an additional annual motor registration fee relating generally thereto and changing the 'Industrial Accident Commission' to be 'State Accident Commission.'"

Cited in the paper is the situation in Virginia where a bill—H-700—passed the House on March 1, 1956, and the Senate on March 10, 1956, authorizing the issuance of indemnification insurance policies. This bill reads in part: "Whereby insuring company assumes the obligation of payment of benefits to persons who are injured and specific death benefits to dependents, beneficiaries or personal representatives of persons who are killed, if such injuries or death is caused by accident and sustained while in or upon, entering or alighting from, or through being struck by a motor vehicle, provided that such obligations are irrespective of any legal liability of the insured or any other person."

A Warning to the Industry

Particularly significant and interesting are these concluding remarks by Professor Kuvin:

"Automobile liability is a many branched and firmly rooted tree. Its growth has been, comparatively speaking, rapid. Its branches and roots were nurtured by many factors: industrial, agricultural, commercial, transportation, migrational, economical and social growth; even pleasure and recreation have had a hand in the phenomenal use of the motor vehicle. Some may say that it was the motor vehicle which caused the phenomenal growth of the other factors. I will not argue which came first: the chicken or the egg. The fact remains we have both. They are both here. They are both growing in number and problems.

"Is the situation identical with the problem of Employer and Employe liability?

"Should the situation be treated the same?

"Is the State of Maryland taking the proper lead? Is that sovereign effectively cutting the 'Gordian Knot?'

"It is the firm belief of this writer that all liability and casualty insurance companies should survey the idea of probable insurance provisions for facilities to undertake the transition from 'liability as imposed by law' coverage to 'compensation' type coverage of

motor vehicle owners and operators. The straws in the wind indicate that the chink in the armour as made by the Virginia legislation passage of Bill H-700 and the Maryland introduction of Bills H-108 and S-112 is making that armour vulnerable. Nothing may ever come of this 'compensation' idea, but insurance companies should be prepared.

"What makes laws? 'Public opinion' is parent of all laws, whether court made or legislative. Surely enough has been and is being said in the legal journals, magazines, newspapers and periodicals in addition to what is transpiring at trade meetings to warrant the prediction that public opinion is on the move to the point that legislators are aware of it and have introduced proposed legislation to satisfy 'public opinion.'

"If history really repeats itself, if laws are passed by the politicos because of public desire and public opinion, if the problem of motor vehicle accidents continues to grow, if sociological and economic forces continue to exert themselves, then it is fair to assume that within the next five to ten years the lawyers, insurance industry and the public will see as drastic a transition in the philosophy of motor vehicle law of liability for injuries and damages, including aircraft, as has occurred in employer-employe liability."

This sounds like excellent advice to us. Again we say that the question to be answered isn't whether the insurance companies can live today and tomorrow with compulsory automobile liability insurance, but rather whether they are preparing for the great changes in the fundamental concepts of automobile insurance of which the widespread adoption of compulsory insurance and U.M. coverage is merely an "advance agent," preparing the way for greater and more significant changes in our social thinking.

ZONING AND PLANNING

Another letter from the same anonymous author of the letters printed in the October "Quarterly" which resulted in the Articles in the December "Quarterly."

February 16, 1956

To the Editor:

After reading the articles in the December 1955 issue on the evils of planning boards, I cannot help but feel amazed how a small anonymous paragraph in the October issue can develop into such a justifiable tirade of righteous criticism. Let me add a few more facts and suggestions to keep the good work going.

I have been told now there are at least three greater Boston towns where the planning boards have acted contrary to their local zoning laws.

Mr. Dane properly points out the pertinent bylaws in 300 municipalities are different and some are weird. How right he is.

The following is the standard "grandfather" clause used by one planning board. "The provisions of this section or any amendment thereof shall not apply to lots not in compliance therewith which were shown as separate parcels on any plan duly recorded by deed or plan in the Norfolk Registry of Deeds on or before March 12, 1956, such deed or plan having been approved by a Board of Survey or the Planning Board where such an approval was required by law; provided further that such lots shown on such deed or plan conformed to the provisions of this Zoning By-Law at the time of such recording."

What does "as separate parcels on any plan duly recorded by deed or plan in—Registry of Deeds prior to—May 1956" mean? When has either the Board of Survey or Planning Board had the power to approve a deed or when did the law require such approval?

One small town did accept the Board of Survey Act in 1927. It apparently accepted and elected its first planning board in 1928. In 1942 it adopted the original of the modern planning board laws with their grief. Its original zoning was in 1929. The town using this "grandfather clause" recently rezoned a major portion of the town.

It is a fair assumption that in 1927 and until 1942, very few people gave much consideration either to the Board of Survey or Planning Boards. Many parcels were subdivided and conveyed without plans. Developments and streets with municipal facilities were created without town objection.

The importance of a fair "grandfather clause" cannot be passed over lightly. If a parcel does not come within its exclusion, the property may be non-conforming. In case of a total or major loss, rebuilding may be denied. Some of the fire insurance forms approved last year and now being used do not include as part of the loss, any additional rebuilding cost due to zoning or building laws.

Under most circumstances, adverse possession can be established after 20 years. An amendment to the zoning laws requiring a standard "grandfather clause" giving full and complete protection after twenty years would eliminate much technical hardship and tend to quiet titles.

The word "arbitrary" is constantly heard in connection with planning boards. Many of us have experienced it. It is unfortunate that more towns do not operate as efficiently as Harwich.

Planning boards in towns are elected. It may be the explanation of their attitudes. In cities they are appointed by the mayor and confirmed by the city council.

Planning board work is unpaid and a labor of love. That is why sometimes a citizen gets shanghaied to run for the office. No one wants it. It also explains why too many of the town planning board members are absolutely unfitted for the job, by education, training, experience and even temperament.

Mr. Dane has got the right idea. The proper development of land areas needs trained specialists not well meaning civic minded do gooders. In most city planning boards, you will find trained engineers, architects, realtors and probably a lawyer for procedure and law, but in the towns too frequently these abilities are absent with the result that those planning boards hire outside professional advice which lacks any local atmosphere and knowledge.

This weakness can be eliminated by having the town moderator appoint and remove the planning board as he does the finance committee or have the selectmen appoint and remove as they do the board of appeals. There should then be more ability and less arrogance.

Very truly yours,,
Anonymous Encore

Note: More discussions invited—Editor.

LEGISLATIVE NEWS

The bar will be glad to know that the three bills for clearing land titles and reducing uncertainty and litigation, recommended by the Judicial Council in its 31st report (with reasons) (reprinted in the December "Quarterly") have been enacted as follows—Chapter 258 as to rights of entry and possibilities of reverter; Chapter 305 as to ancient leases and Chapter 348 as to formal defects more than ten years old (the clause relative to corporate authority being omitted by amendment). We recommend prompt reading of them for reference or use in practice.

Mr. Frederic B. Dailey's bill (S.274) to limit dower and courtesy to land owned at death (printed in the December "Quarterly") has been referred to the Judicial Council. Suggestions will be welcomed.

The bill for the filing of Zoning Ordinances, bylaws, etc. (H.964) printed in the December "Quarterly" (p. 22) and another bill, without teeth, S.272 have been referred to the Judicial Council. Suggestions will be welcomed. Compare letter from "Anonymous Encore" in this issue.

The "Bar Bulletin", of the Boston Bar Association, for May, contains a critical discussion of the auditor system.

The A.B.A. "Coordinator" of May 1st reports.

Social Security for Lawyers given Senate Committee OK

Just two months after the House of Delegates voted 100 to 25 in favor of including lawyers under federal social security, the U. S.

Note: A great many "self-employed" lawyers having expressed their desire to be taxed for compulsory Social Security are apparently going to have their wish granted. It is interesting to note that the medical profession and the osteopaths were opposed to being thus taxed and are to be left out of the law. The question whether the doctors and osteopaths are wiser than the lawyers will be answered by the facts of the future. Meanwhile the A. B. A. Journal for February, 1956 (p. 304) carried a letter from a lawyer who has been under Social Security for years as a salaried corporation counsel. He says "I have been astonished at the way so many ..... are yearning to bring themselves and their fellows under compulsory Social Security," and he states his reasons.

F. W. G.

Senate Finance Committee tentatively approved such a bill. The measure was passed last year by the House of Representatives, and in addition to lawyers would bring dentists under social security. The Senate committee vote, on April 24, was labeled tentative because two members were absent and the bill could be reconsidered. However, the approval was expected to stand, sending the bill to the Senate floor.

The Senate Committee action appears to bring lawyers' social security a long step nearer. The committee accepted practically all additional coverage provisions of the House-approved bill except that it omitted osteopaths because they "asked to be left out." Doctors of medicine also were omitted.

The present social security tax is two per cent each on employes and employers, and three per cent on self-employed persons, on the first $4,200 of annual income. As passed by the House the bill would raise these rates to 2 1/2 per cent each for employes and employers, and 3 3/4 per cent for self-employed. However, the Senate Committee did not act on these proposed increases. They are intended to pay for some additional social security benefits, which the Administration opposes and which are in controversy in the Senate Committee. One would lower from 65 to 62 the age at which women would become eligible for retirement payments. The committee said it would get to these changes and the tax increase provisions later.

Jenkins-Keogh Bills Still Await Action

Meanwhile, action still is awaited in the House of Representatives on the Jenkins-Keogh bills to permit professional and other self-employed persons to set up private pension plans under an income tax deferment system. Although approved last year by the Ways and Means Committee, the bills have been made a part of the omnibus tax bill—which embraces miscellaneous minor changes in the tax laws—and there has been no indication if the legislation will reach the House floor for consideration at this election-year session. Word from Washington last week was, however, that the Committee had agreed to put disposition of the omnibus bill on its agenda for early consideration.

Also on April 24, further hearings were held by a Senate Judiciary subcommittee on the Reed-Dirksen amendment to put a 25 per cent ceiling on income tax rates except in cases of national emergency. This constitutional proposal was approved in 1953 by the ABA House of Delegates.

Entry of Judgment by Clerks of Court

The October "Quarterly" contained a short article by Mr. Neal, the Clerk of Courts for Norfolk County, on "Is Your Judgment Valid?" (pp. 28-30) with a note on p. 30 asking for suggestions. Attention was called to the practice as described in Colby's "Practice in 1848" and it was suggested that if clarification of the difference

between "ministerial" and "judicial" acts is needed by Clerks for administrative purposes it should be by rule.

As Mr. Neal pointed out, Clerks act under G.L. Chapter 231, Section 57 and Chapter 235, Section 5, which provides that damages may be ascertained and assessed by the Clerk "under a general order of the Court or by special reference to him."

This Section 5 has been in force in the same words since the Revised Statutes of 1836, Chapter 97, Section 4, which (as appears in the commissioner's notes) "merely adopted and sanctioned the practice" then existing.

Rule 78 of the Superior Court is "a general order" and, presumably, there have been similar "general orders" in other, and present, courts since 1836. To what extent the general order has been understood and applied in practice since 1836 we do not know, but Mr. Neal's article suggests that there is misunderstanding and resulting unauthorized assessments and judgments entered by some Clerks.

There seems no need at all for changing the statute now 120 years old. As we see it, all that is needed is an inquiry by the courts of the Clerks as to their practice, or that of their assistants, and, then, if necessary, clarifying Rule 78, or any other "general order", by explaining the difference between "ministerial" and "judicial" acts for the guidance of clerks, counsel, the judges and others in future.

Perhaps, this can best be done, when necessary, by simply calling their attention to the following letter from a clerk of long experience, in answer to our inquiry as to the practice in Essex County. We shall be glad to hear from anyone on the subject. At present, Mr. Metcalf's letter seems to us to say all there is to say.

F. W. G.

LETTER OF CHARLES H. METCALF

I am familiar with the article written by Mr. Neal. His estimate that 90 percent of the judgments entered by the clerk in contract actions after default are void would not represent the situation in Essex County.

This is a matter which has claimed our attention over the years. It is elementary that the clerk is a ministerial officer and not a judicial one, but it isn't always easy to draw the line.

Under General Laws 231 Sec. 5 and the enabling Rule 78 we have been guided by Cochrane v. Forbes 267 Mass. 417, cited in Mr. Neal's article, which defines the word "undisputed" as "agreed upon as to amount by the parties, or fixed by operation of law, or under the correct applicable principles of law made certain in amount by the terms of the contract or by mathematical calculations".

I don't claim that someone, sometimes, might not have made a mistake, but we would not now and never have, to my knowledge, computed a judgment under such a declaration as Mr. Neal cites in Lanowher v. Gillette, where a promissory note promised to pay a reasonable attorney's fee unless the amount was fixed "by the terms

of the contract" by a stated amount or a percentage. It is rare that we have one of these cases not coming within the Cochrane case where we decline to compute the judgment, and we do not hesitate to decline if it is questionable. They are mostly the promissory note "reasonable fee" cases, and we send them to the court.

I don't see how the new section, proposed but not adopted, would help because, while it would appear to do so, judicial functions cannot be delegated to the clerk and we could still do only what we do now under the old statute, namely, decide what is ministerial and what is judicial.

Your suggestion that the Superior Court clarify its rule by explaining more clearly the difference between ministerial and judicial acts would not meet with success. It would not be a part of their rule-making function.

The reactions of the other clerks, especially in Suffolk, Middlesex and Worcester, would be of interest to me.

Criticism without constructive suggestion is inadequate, but after some reflection, I do not seem to come up with a solution which will better the present arrangement. Mr. Neal has my respect and admiration for trying to do so.

Sincerely,

Charles H. Metcalf, Assistant Clerk.

The Writ of Summons Still Misleads

Judge Brooks of the First District Court of Eastern Middlesex has called our attention to the fact that the form of summons revised about 20 years ago still brings people to court when they are not wanted or expected. Unfortunate persons who have been induced to waste their time and, perhaps, a day's wages because courts mislead them by the form of writ which appears to say what it does not mean, have undoubtedly been worried, as still more of them were for generations before the early thirties.

The story is as follows—in its 2nd report in 1926 (reprinted on 12 Mass. Law Quart. No. 2, December, 1926, pp. 37-44) the Judicial Council discussed the matter at some length and suggested revised forms of various writs, especially the summons. The clerks tried to meet the problem by a sensible note (not authorized but tolerated by the court) but footnotes are apt to be ineffective, in view of the portentous command in a writ. Nothing more happened until about 1935 when the summons was revised, but, as pointed out by Judge Brooks, it still misleads in his court, and, if there, probably in all the other courts. It has always seemed to us to be unhealthy for courts to mislead laymen by formidable and *official* misstatements. Just how to improve the writ without losing its needed force, we are not clear at the moment but we believe that it can be done. We shall be glad to hear from other courts as to how many people appear when not wanted.

F. W. G.

"The Expanded Seventh Edition of Crockers' Notes on Common Forms."*

The need, the demand (as shown by its sales in the first six months since publication) and its appearance, together with the Perpetuities Act of 1954 and the three acts relative to titles enacted this year, all long needed and referred to elsewhere in this issue, indicate the beginning of a new chapter in dealing with land. The bar and the Legislature of Massachusetts have waked up to the fact that even in so technical a branch of the law as that relative to land, it is possible, if statutory provisions are "thought through" with care in advance, to make real estate more marketable, as it should be.

Roger Swaim, the editor of the new 7th Edition (as well as of the 6th in 1938) needs no introduction.

Crockers' "Notes" has been one of the best known and most used practice books in Massachusetts for generations. It first appeared in 1867. Its use has not been confined to conveyancers because all practising lawyers who are not mere specialists are apt to be faced at any time with some question of conveyancing of a practical, but technical character, and they want as far as possible a ready reference, not only to the technical but to the practical answer to the problem. As the original edition grew out of the notes made by Uriel H. Crocker in the course of his active practice in Boston, it met the needs of the profession, and the late Mr. Justice Holmes, in a brief review of the second edition when it appeared in 1872, said

> "This is one of the first books which a lawyer practising in Massachusetts needs to buy."

So this new edition reflects the up-to-date knowledge, judgment, and experience of many years with the constantly expanding problems of active conveyancing practice of the editor.

As we believe a little history helps us to understand our current law, we regret the omission from the "Preface" of the story of Lord Northington which was quoted in the Sixth Edition.

It has, perhaps, added human interest when one realizes that Lord Northington was a genial 3 bottle man in the 18th century manner.

The story is from Campbell's "Lives of the Lord Chancellors," second series, p. 168, where Lord Campbell (who, as a biographer, was said to have added new terrors to death) said of one of Lord Northington's decisions—

> "In the course of his rather arrogant judgment, he gave deep offence to the irritable race of conveyancers, by observing in corroboration of a remark at the bar, that the conveyancers had not thought about it,—'which is natural enough, their time being more dedicated to perusal than to thought!' But they had their revenge when the case was heard, upon appeal, in the House of Lords, for Lord Hardwicke moved the reversal in a

*See p. 2 of this issue.

most crushing speech, in which he said the opinion—the course of conveyancers is of great weight. They are to advise, and if their opinion is to be despised, every case must come to law. No! the received opinion ought to govern. The ablest men in the profession have been conveyancers."

Without intending to accumulate flattery for the conveyancing bar, it may be well to remind the bar in general of a remark of the late Felix Rackemann, who had had a long and varied experience as a general practitioner. He said, "I think some time in the registry of deeds, examining titles, is one of the best preparations for a man who wants to try cases in court because it teaches him the importance of details".

F. W. G.

MEDICO-LEGAL ASPECTS OF BLOOD TESTS

By JOHN F. LOMBRD*

Blood grouping tests have now become a recognized and standard procedure in various types of cases in American and foreign courts. They are used in disputed paternity matters, in divorce and separate support where the paternity of a child is in question as well as in rape, murder and kidnapping cases. They are used for identification of bodies in bad accidents and fires. They are used in cases of a claimed interchange of infants in hospitals or other places. Non-maternity can be established in a certain percentage of cases. Such tests are used in many states to aid courts to scientifically determine the sobriety of defendants in alleged driving under the influence of liquor cases. Massachusetts has no statute.

The following fourteen states have statutes on blood tests on disputed paternity.

Indiana	Deering's Cal. Code, ch.8, s.1980.1—1980.7
Maine	Burns Ind. St., s.3—658
California	R.S. (1944) ch.153, s.34 Rev. St., ch.166, s.34
Maryland	Anno. Code, Gen. Laws (Flack Supp. 1943) Art. 12, No. 17
Massachusetts	Gen. Laws (Ter.Ed.) ch.273, s.12a Mass. St. 1954, ch.232 effective 3/23/54
New Hampshire	Rev. Laws 6126 of 1953 effective 4/29/53
New York	N.J.S.A., 2:99—3, 4

*Author of—*Marriage and Divorce Laws of Mass.*
—*Adoption, Illegitimacy and Blood Tests.*

New Jersey	C.P.A., s.306a—code of Cr. Proc., s.684a Superior Cr. Courts Act, s.684a Domestic Relations Law, s.126a Domestic Relations Act of City of New York, No. 34 (1942)
North Carolina	G.S. (Michie Supp. 1945) s.49-7.
Ohio	Gen. Code, 12122—1, 2.
Pennsylvania	Acts 1951, act no. 92 Purdons St. Title 28, s.306
Rhode Island	Gen. Laws 424, s.8 as amended St. 1949, ch.2322
South Dakota	S.D.C. (1939) 36.0602, Sup. Ct. Rule 540 (1939)
Wisconsin	St. 1949, ss.166.105, 325.23

All statutes provide that the tests are admissible in evidence only when an exclusion of paternity has been established.

Blood grouping tests have been used for years in England, Germany, Austria, Russia, Denmark, Norway, Sweden, Belgium, Holland, Japan, China, Italy, Lithuania, and others.

Except in very unusual circumstances of isolation, blood tests cannot affirmatively fix paternity on a man but they may scientifically and clearly exonerate him. In other words, up to the present time it may be said that they cannot prove paternity but can definitely exclude it. This is based on the accepted foundation that if the blood types of the mother and putative father match with that of the child in conformity with the recognized genetic theory, it could be coincidental but if the types do not match, parentage is excluded beyond doubt. Each chromosome carries the genes which are the basis of the definitely specific inherited characteristics recognized throughout the world. Identical genes are said to be homozygous, and non-identical genes are known as heterozygous. Briefly, to illustrate generally, if the child has a blood factor not in the mother or putative father, clearly it had to come from a man other than the putative father. For example, mother O, putative father O, child A or B or AB. The validity and accuracy of blood grouping tests and their mode of inheritance is attested to by leading scientific and medical authorities of all countries.

The blood grouping of any individual must depend on the blood group of his or her true parents. A blood factor definitely will not appear in a child unless present in at least one of the true parents. In case of an exclusion, the expert testifies, not as to his opinion only but as to a scientifically recognized fact. These tests may be done right in the courtroom. The expert must be a specialist. An M.D. degree alone certainly does not qualify a person as a blood grouping expert. Some of the best recognized experts do not possess the degree of M.D. A man may have a degree of Doctor of Science

or an immunologist may have a Doctor of Philosophy degree and be top man in the field.

The usual blood groups and types are described as A, B, AB, O, Rh-Hr, MNS, P, Fy (Duffy), Kk (Kell-Cellano), J (Kidd), Le (Lewis), Lu (Lutheran). The symbols C.D.E. are used by some of the experts instead of Rh-Hr. Other types are not developed sufficiently for medico-legal use as yet.

About 55 per cent or slightly better of incorrectly accused men may be excluded thus far. The other 45 per cent although they may really be innocent and not the true fathers are not excluded by science as yet due to the coincidence of the real true father of a child having the same blood group factor as the putative father.

Blood factors are not changed or obscured by age, illness, diet, disease or climate and are not influenced by other factors in the body. Neither are the blood factors influenced by the facts of any case. The result of blood tests done scientifically by an expert cannot be the subject of controversy or varying interpretation by either side. All are bound by the same laws of inheritance and no expert would risk a blot on his reputation to testify to what is not true as a matter of science.

Briefly, a child born in wedlock is presumed to be legitimate but this presumption may be rebutted by evidence that the husband is impotent or by evidence beyond all reasonable doubt that the husband could not have been the true father. See: Taylor vs. Whittier, 240 Mass. 514, 138 N.E. 6; Comm. vs. Circo, 293 Mass. 361, 199 N.E. 896; Comm. vs. Kitchen, 299 Mass. 7, 11 N.E.2d 482; Sayles vs. Sayles, 323 Mass. 66, 80 N.E.2d 21; Silke vs. Silke, 325 Mass. 487, 91 N.E.2d 200.

Blood grouping tests are a wholesome scientific aid to courts in the administration of Justice.

Cases

Nonmaternity

Mrs. T., a seven-time married woman, started a separate support suit against her husband who filed cross action for annulment. She claimed that during her sixth marriage, she had an affair with Mr. T, as a result of which she became pregnant. Mr. T thought that he was responsible and married her. He insisted that the child was not his wife's offspring and he had been inveigled into marrying her on the pretext that it was her child. Blood tests excluded Mrs. T as the mother. Investigation revealed that Mrs. T had her uterus and tubes removed by operation at a time before this trouble occurred. Later on, the true father of the child was located and it was learned that Mrs. T had obtained the child from an orphan asylum where it was placed by the true father after the death of the true mother. Mr. T was granted the annulment. Maternity is excluded if mother-child combinations are found as follows: mother

O, child AB; child AB, mother O; mother M, child N; mother N, child M; mother Rh negative, child Hr negative; mother Hr negative, child Rh negative.

Inheritance

Mr. A wanted to disinherit a child thought by all to be his own. He accused his wife of having been unfaithful and implicated Mr. B whom he alleges to be the real father of the child. Blood tests were done and they showed Mr. A to be of Group O. Mrs. A was Group A. The child was AB. Mr. B was in Group B. Mr. A is not the true father as he is O which excludes A and B. The child evidently got A factor from the mother and B factor from the true blood father. Mr. B is eligible for consideration.

Paternity

Miss K was keeping company with Mr. V. She became pregnant, gave birth to a child and brought bastardy proceedings against Mr. V. Mr. V admitted sexual relations with Miss K but denied paternity and showed through evidence that at or about the time of conception, she was going out with two other men. Blood tests were taken and proved Miss K of Group O; that Mr. V was of Group B and the child of Group A. Science said Mr. V was definitely excluded and could not be the father as Mr. V did not have an A factor in his blood. The mother had O which excluded A and B so the child got A factor from its true father; one of the other men she must have had sexual relations with.

Perfect Defence

In Comm. vs. Hufford, 42 J. Crim. Law, Criminology and Police Science Va, 1952, a defendant called Paul Hufford was arrested and charged with being the father of a child born to a young mother. The defendant denied paternity on the ground that said defendant was female. A medical examination was agreed to and the examining physician reported to the court that the defendant was really female. The case was dismissed.

ADMISSIBILITY OF RECORDS TO IMPEACH THE CREDIBILITY OF A WITNESS

EDWARD V. KEATING*

Many lawyers, no doubt, in the trial of an issue, have been faced with the situation where a criminal record is offered by the opposing counsel to impeach the credibility of a witness. The admission of such a record may seriously affect the value of the testimony offered by the witness and more often than otherwise, may result in an unfavorable verdict or finding. Hence the importance of the possession by the trial lawyer of a working knowledge of the law and principles governing the admission of such a record.

G.L. Chap. 233, S.21, as amended by Acts of 1950, Chap. 426, provides:—

"The conviction of a witness of a crime may be shown to affect his credibility, except as follows:

First, the record of his conviction of a misdemeanor shall not be shown for such purpose after five years from the date on which sentence on said conviction was imposed, unless he has subsequently been convicted of a crime within five years of the time of his testifying.

Second, the record of his conviction of a felony upon which no sentence was imposed or a sentence was imposed and the execution thereof suspended, or upon which a fine only was imposed, or a sentence to a reformatory prison, jail or house of correction, shall not be shown for such purpose after ten years from the date of conviction, if no sentence was imposed, or from the date on which sentence on said conviction was imposed, whether the execution thereof was suspended or not, unless he has subsequently been convicted of a crime within ten years of the time of his testifying. For the purpose of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section. (1950, 426, appvd. May 8, 1950: effective 90 days thereafter.)

Third, the record of his conviction of a felony upon which a state prison sentence was imposed shall not be shown for such purpose after ten years from the date of expiration of the minimum term of imprisonment imposed by the court, unless he has subsequently been convicted of a crime within ten years of the time of his testifying."

Under the first section of the above statute (relating to records of conviction of a misdemeanor) the term "conviction" means a final judgment and sentence of the court conclusively establishing guilt. Merely showing a verdict, finding or plea of guilty or the placing of a "misdemeanor" offence "on file" or the placing of a defendant on "probation" does not constitute a "conviction" within

*Assistant Clerk, Superior Court for Criminal Business, Suffolk County.

the meaning of this (first) section: Commonwealth vs. Hersey, 324 Mass. 196 @ 205; Commonwealth vs. Sacco 255 Mass. 369 @ 427; Commonwealth vs. Dowdican's Bail, 115 Mass. 133.

For the meaning of the term *"conviction"* relating to records of conviction of a felony, see second part of above statute.

Whatever may have been the practice of the Courts (see Commonwealth vs. Hersey supra and Judicial Council Reports, 28 Mass. Law Quarterly P.28) relative to the admission of records to impeach credibility in those cases, both felony and misdemeanor where the execution of the sentence (either a fine or imprisonment) was suspended following a verdict, finding or plea of guilty, the admissibility of these records as to felonies was settled by the amendment to the second part of the statute (st.1950, c.426) and as to misdemeanor offences, by the decision of the Supreme Judicial Court in the case of Forcier vs. Hopkins, 329 Mass. 668, where the question to be decided concerned the admissibility of the records of two convictions of the plaintiff of misdemeanors committed in 1951. Each record showed that the plaintiff was found guilty, was sentenced to the House of Correction which sentences were suspended and the plaintiff was placed on probation in each instance. The Court said in part:

> "that the term conviction as used in the Statute G.L. Ter. Ed. C.233, s.21) means a judgment that conclusively establishes guilt after a finding, verdict or plea of guilty . . .
> In a criminal case the sentence is the judgment . . . Suspension of the execution of the sentence by direction of the Court under G.L. Ter. Ed. C.279, s.1 as amended, does not effect the finality of the judgment . . . The suspension is not a final disposition of the case and when revoked the sentence may be enforced. The records which were admitted in evidence were records of final judgments which conclusively established the plaintiff's guilt of the offences charged."

The Court in its opinion did not, however, discuss the fact that in addition to the "suspended sentences" the defendant was also placed on "probation", which fact is of interest because in accordance with the case of Marks vs. Wentworth, 199 Mass. 44, if a defendant complies with the term of his probation the case ultimately will either be placed "on file" or "dismissed". If such a case is ultimately placed "on file" or "dismissed", the question then arises as to whether or not in either of these events a record continues to be admissible for the purpose of impeaching credibility. The better rule would seem to be that when such a *misdemeanor* case is ultimately placed "on file" or "dismissed", that in either case it is no longer admissible to impeach credibility for the reason, with reference to the case placed "on file" that the Court, by making such an order has brought the case within the purview of the law laid down in the case of Commonwealth vs. Dowdican's Bail supra, where the Court said in part:

"Such an order (placing an indictment "on file") is not equivalent to a final judgment . . . ; but is a mere suspending of active proceedings in the case . . . and leaves it within the power of the Court upon the motion of either party to bring the case forward and pass any lawful order or judgment therein."

For an interesting discussion of this subject by the Federal Courts see the case of Pino vs. Nicolls, 215 Federal 2nd, 237 and a Per Curiam opinion by the Supreme Court of the United States in April, 1955, overruling the Circuit Court of appeals and stating that where a case is ultimately placed "on file" that the *conviction* has not attained such *finality* as to support an order of deportation under the Federal Law.

Where, however, such a case is ultimately "dismissed" having in mind that the effect of dismissing a complaint or indictment without trial being that the defendant is exempted from liability on that complaint or indictment and if the dismissal is made after the trial began without the consent of the defendant it is in legal effect an acquittal, Commonwealth vs. Bressant, 126 Mass. 246, Commonwealth vs. Hart 149 Mass. 7, Commonwealth vs. Michelli, 258 Mass. 89, it would seem to follow that such a complaint or indictment is no longer competent to impeach the credibility of a witness. To the same effect see Marks vs. Wentworth, supra. Cf. U.S. v. Cunha, 209 Federal 2nd 326 @ 330. See also fifth report of Judicial Council, 15 Mass. Law Quarterly, December 1929, p.29.

If the rule laid down in Forcier vs. Hopkins that the suspension of the execution of sentence does not affect the finality of the judgment is to be extended it would appear to govern the admissibility of a *misdemeanor* record under G.L.C. 279, s.4, where the court has the power to stay the execution of such a sentence upon the filing of an appeal or bill of exceptions. Under such circumstances however, I submit such a record ought not be admissible to impeach credibility even though there was a sentence, because under the statute in staying the execution of such a sentence pending appeal, the court must be satisfied that in his opinion there is reasonable doubt whether the judgment should stand. However, if the case under discussion was a *felony* as distinguished from a *misdemeanor* such a record would be admissible to impeach credibility under the amendment to the second part of the statute. (St. 1950, C.426)

With reference to the admissibility of records pertaining to *felony offences*, the question also arises as to their admissibility where, following a finding or verdict of guilty, or a plea of guilty, a defendant has thereafter been placed on probation either with or without a suspended sentence and later, having complied with the conditions of his probation, the case is "dismissed". If the law of the cases of Marks vs. Wentworth, supra, Commonwealth vs. Bressant, supra and Commonwealth vs. Michelli, supra, is applied it would seem to follow that such a case, when it is dismissed, is no

longer admissible to impeach credibility notwithstanding the amendment to the statute (G.L. C.233, S.31) by the Acts of 1950, C.426. If such a case however, was ultimately placed "on file", I submit it would be admissible in accordance with said amendment of 1950.

The foregoing review of the admissibility of records of misdemeanor offences which have been placed "on file" or "dismissed" following the imposition of a suspended sentence and a period of probation and of those cases in which a sentence was imposed and then stayed pending appeal to the Supreme Judicial Court is suggestive of the fact that perhaps the admissibility of such records ought to depend in some measure upon whether or not the sentence imposed is final, i.e. the sentence is executed.

In accordance with the foregoing statute for the purpose of simplification and clarification I offer for your consideration proposed rules governing the admissibility of records. It is to be observed that although several of the proposed rules appear to be similar, a study will show that they are distinguishable and that each proposed rule applies to different facts and circumstances that determine the admissibility of records. With reference to Rules 1, 3, 4, 5 and 6 it has been assumed by the writer for the purpose of said rules that the court is concerned with the admissibility of *one record of conviction* only and not several as is the case under Rules 2, 7 and 8.

RULE 1.

The record of witness' conviction of a misdemeanor shall not be shown for the purpose of effecting his credibility after five years from the date on which *sentence* on said conviction was imposed.

RULE 2.

If a record of a conviction of a misdemeanor has been admitted under Rule 1 then all other prior records of conviction of crimes (felony or misdemeanor) *regardless of the date of conviction are admissible.*

Example: Witness testifying June 1, 1952. Record of conviction of misdemeanor dated June 1, 1950, was admitted to effect his credibility. There also was offered to effect his credibility a second record of conviction (either felony or misdemeanor) dated June 1, 1935. Second record of conviction is admissible even though more than five years had elapsed since date of record of first conviction.

RULE 3.

The record of conviction of a felony where no sentence was imposed shall not be shown to effect credibility after ten years from the date of conviction. (For the purpose of this rule a plea of guilty or a finding or verdict of guilty shall constitute a conviction.)

RULE 4.

The record of conviction of a felony where sentence was imposed and suspended shall not be shown to effect credibility after ten years from the date on which said sentence was imposed and the execution thereof suspended.

RULE 5.

The record of conviction of a felony where sentence by fine or to a reformatory prison, jail or house of correction was imposed shall not be admissible to impeach credibility after ten years from the date on which sentence on said conviction was imposed.

RULE 6.

The record of conviction of a felony upon which a sentence to State Prison was imposed shall not be admitted to impeach credibility after ten years from the date of the expiration of the minimum term of imprisonment imposed by the court.

RULE 7.

If the record of a conviction of a felony has first been admitted under rules 3, 4, 5 and 6, then all prior records of conviction *of a felony regardless of date of conviction or sentence* are admissible.

Example I: Witness testifying June 1, 1952. Record of conviction of a felony dated June 1, 1945 was admitted to effect his credibility. There was also offered a second record of conviction of a felony dated June 1, 1930. Second record of conviction *admissible* even though more than ten years had elapsed since date of first conviction.

Note: If second record of conviction was a misdemeanor, second record *would not be admissible* because witness has not been convicted of crime within five years of time of his testifying. Compare with Rule 8.

Example II: Witness testifying June 1, 1952. Record of conviction of misdemeanor dated June 1, 1946 and record of conviction of a felony dated June 1, 1945 was offered to impeach credibility. The record dated June 1, 1945 being a felony *is admissible* and record dated June 1, 1946 being a misdemeanor *is not admissible* because the conviction was not within five years of time witness was testifying and it is not made admissible because of admission of felony record for the reason that admission of felony record could only make all *prior* records of convictions of *felonies* admissible.

RULE 8.

If the record of a conviction of a felony has first been admitted under Rules 3, 4, 5 and 6, *and said record is within five years* of time

witness is testifying then all prior records of conviction *either felony or misdemeanor are admissible regardless of date of conviction or sentence.*

Example: Witness testifying June 1, 1952. Record of conviction of felony dated June 1, 1948 was admitted to effect his credibility. Second record of conviction of a misdemeanor dated June 1, 1932 was offered for same purpose. Second conviction *admissible* even though more than five years has elapsed since date of first conviction.

Note: If first conviction was not within five years of time when witness was testifying, second record of conviction being a misdemeanor would not be admissible. *Contra,* if second record was a felony because first conviction was within ten years of time witness testified. See example I, under Rule 7.

Note: In conjunction with Rules 2, 7 and 8 the Case of Commonwealth vs. Cohen, 234 Mass. 76 is discussed.

This case is sometimes cited as authority for the statement that where the record of a misdemeanor has been properly admitted against a witness any other record of a misdemeanor in order to be admissible must be dated five years (ten years in case of felony) from the date of the record of conviction which was first admitted. In other words the subsequent conviction must have occurred within five years from the date of the one first introduced in evidence, to render the subsequent conviction competent under the Statute. This is a correct interpretation of the Cohen Case, where the Court said that the record of the second conviction was not admissible because it did not occur within five years from the date of the first conviction, but it should be borne in mind that the Cohen Case was decided in accordance with St. 1914 C. 406, and it is submitted that it is not authority for the interpretation of the statute as it now exists because shortly after the opinion in the Cohen Case was handed down in 1919 a new statute on the subject was passed in 1920 substantially in the same form as it exists today. The language in the St. 1920, C.120 relative to the admissibility of subsequent records is similar to the language of St. 1913, C.81. The Court said in the Cohen Case that the record in question would have been admissible under St.1913, C.81. It is therefore submitted that Rules 2, 7 and 8 are the correct interpretation of the statute as it exists today.

Effect of Plea of "Nolo Contendere."

Such a plea is in fact a confession, upon which, if accepted, the defendant may be sentenced, and so far as procedure in the particular case is concerned is equivalent to a plea of guilty.

Commonwealth vs. Horton, 9 Pick. 206

Commonwealth vs. Ingersoll, 145 Mass. 381

It cannot be used as an admission in a Civil Suit for same act.

It is an implied confession of guilt only. It cannot be used against the defendant as an admission in any civil suit for the same act.

Commonwealth vs. Ingersoll supra
White vs. Creamer 175 Mass. 567

It cannot be used to effect credibility of the witness.

A conviction following a plea of "Nolo Contendere", cannot be used in another proceeding to effect the credibility of a witness.

Olszewski vs. Goldberg, 223 Mass. 27.

Attestation or Certification of Records of this Commonwealth.

Records should be attested either by the Clerk or Assistant Clerk.

Com. v. Quigley 170 Mass. 14.

Assistant Clerks have the same power to certify copies of records of courts of this Commonwealth as clerks without further certificate that assistant clerks have charge of records.

Com. v. Quigley supra
Com. v. Harvey, 111 Mass. 420.
Com. v. Crawford, 111 Mass. 422.
G.L.C.221 S.5

Form of Record

A record need not be under the seal of the court. It would be better form however if it bore a seal of the court.

Com. v. Quigley supra

The words "A Copy Attest" followed by signature are sufficient attestation even though the word "True" is omitted because a copy of a record thus authenticated by one who has authority to do so must be taken as a true copy, for it cannot be a copy if it is false.

Com. v. Quigley supra

Mass. Statute on Records of Court of other State, or United States.

G.L. C.233, S.69

"The Records and judicial proceedings of a court of another State or of the United States shall be admissible in evidence in this Commonwealth, if authenticated by the attestation of the clerk or other officer who has charge of the Records of such court under its seal."

Attestation or Certification of Records of Court of other States of United States.

By the Clerk: The Clerk is the proper custodian of the Record of the Court and the Seal of the Court attached to his certificate attests the possession of the records in the person who certifies and a record so certified is admitted under our statutes without further proof.

Willock v. Wilson, 178 Mass. 68, 74.

G.L.C.233, S.69

By the Assistant Clerk: Where the certifying officer is other than the Clerk it should appear by the certificate or otherwise that he has "Charge of the Record."

Willock v. Wilson, supra
Kingman v. Cowles, 103 Mass. 283.

When however a Deputy Clerk of U. S. District Court brings records to the witness stand and testifies that the records produced comprise the original papers of the District Court such records are admissible.

Kaugman v. Kaitz, 325 Mass. 149, 151.

Federal Statute pertaining to Records and Judicial Proceedings; full faith and credit.

U.S.C.A. Title 28 Sec.1738

"The acts of the Legislature in any State, territory or possession of the United States, or copies thereof shall be authenticated by affixing the Seal of such State, Territory, or Possession thereto."

The records and judicial proceeding of a Court of any such State, Territory, or Possession or copies thereof, shall be produced or admitted in other Courts within the United States and its territories and possessions by the attestation of the Clerk and Seal of the Court annexed, if a seal exists, together with a certificate of a Judge or the Court that the said attestation is in proper form.

Such acts, records and judicial proceedings or copies thereof, so authenticated shall have the same full faith and credit in every Court within the United States, and its territories and possessions as they have by law, or usage in the Courts of such State, territory or possession from which they are taken.

Massachusetts Statutes will prevail in determining admissibility of Records of other States.

The foregoing Federal statute is based upon U. S. Rev. statute S.905 to which statute the Court referred to in the case of Portland, Me. Publishing Co. v. Eastern Tractors Co. 289 Mass. 14, which held that judicial records which meet the requirements of our own statute (See G.L. C.233 S.69 above) are admissible *although such records did not entirely comply with the somewhat stricter provisions of said U.A. Rev. statute* Sec. 905.

See also Kingman v. Cowles, 103 Mass. 283.

Date of Record.

The fact that copy of record does not bear date when it was signed by the clerk is not fatal to its admission so long as its recitals show that it was so signed after the events as stated in the record

took place. The precise date of the clerks act of authentication is not material.

Portland Maine Publishing Co. v. Eastern Tractors Co. 289 Mass. 13, 16.

HOW WITNESS IMPEACHED.

Credibility of witness can only be impeached by producing record.

Com. v. Walsh, 196 Mass. 369.
Com. v. Danton, 243 Mass. 552.
Com. v. Hayes, 253 Mass. 541.

Parole evidence is admissible however to identify witness as person named in record.

Com. v. Morgan, 107 Mass. 199.

RECORD CANNOT BE EXPLAINED.

Witness not allowed to explain record of conviction which has been admitted in evidence to impeach his credibility.

Lamoureux v. N. Y. etc., Railroad, 169 Mass. 338, 240.
Com. v. Gallagher, 126 Mass. 54.
Gertz v. Fitchburg Railroad, 137 Mass. 77, 88.
Com. v. Galligan, 56 Mass. 270.

Compare however those cases where plea of guilty is admitted as an admission of material facts alleged in the complaint or indictment and which plea may be explained and reason shown for entering it.

Morrissey v. Powell, 304 Mass. 268.

It is interesting to note in above case that a plea of guilty even though the court allowed defendant to retract the same was admitted on the principal set forth above. The Court said "under such circumstances the plea of guilty is not conclusive and is nothing more than a piece of evidence inconsistent with the defendants later claim that he is not guilty."

Note: Since the writing of this article the Acts of 1955, Chap. 770 effective October 20, 1955, amended the General Laws by striking out Chap. 125, and inserting a new Chap. 125. Section 1 thereof provides as follows:

"Section I. In this chapter and elsewhere in the General Laws the following words shall have the following meanings:

'Massachusetts Correctional Institution, Boston', the state prison; 'Massachusetts Correctional Institution, Walpole', the state prison; 'Massachusetts Correctional Institution, Norfolk', the state prison colony; 'Massachusetts Correctional Institution, Concord', the Massachusetts reformatory; 'Massachusetts Correctional Institution, Framing-

ham', the reformatory for women; 'Massachusetts Correctional Institution, Bridgewater', the state farm; 'Massachusetts Correctional Institution, Plymouth', the state prison camp at Plymouth; 'Massachusetts Correctional Institution, Monroe', the state prison camp at Monroe.

The above named institutions shall constitute the correctional institutions of the Commonwealth. In this chapter the word 'Commissioner' shall mean the commissioner of correction."

The effect of section 1 is that henceforth where a term sentence is imposed the sentence shall be to a penal institution of the Commonwealth as designated in said section. For example if penalty calls for imprisonment in the State Prison then that institution will be designated in the record as "Massachusetts Correctional Institution, Walpole."

THE RIGHT TO SILENCE

REV. ROBERT F. DRINAN, S.J.*

(Reprinted by permission from the issue of "America" of April 25, 1956)

During 1953 a total of 317 witnesses before Senate and House Committees invoked the privilege against self-incrimination. On August 20, 1954 Congress enacted its answer to these recalcitrant individuals. That answer was a statute providing under certain conditions for total immunity from criminal prosecution for those persons who otherwise would refuse to testify about subversive activity by reason of the Fifth Amendment. On March 26, 1956 the Supreme Court, in a 7 to 2 split, sustained the constitutionality of Congress' attempt to obtain information by granting pardon for crime in advance.

The Court's opinion raises questions basic to the scope and purpose of the Fifth Amendment. Does the Amendment deal with a natural right to silence or merely with a state-given privilege not to incriminate oneself? Is the Fifth Amendment merely a privilege which the state may revoke by granting a pardon in exchange for information? The Supreme Court has followed its traditional majority view and has held that the right not to accuse oneself may be totally abolished so long as the compelled accusations and the obligatory self-defamation cannot lead one to prison. Is this, as Federal Chief Judge Clark and Justices Douglas and Black have asserted, an "erosion of the Fifth Amendment"? Is an immunity statute a circuitous attempt to circumvent the Constitution by abrogating the right against self-incrimination? The answer to these questions unfortunately is not as simple—or as clear—as we could hope.

*Father Drinan is Assistant Dean of the Boston College Law School and a member of the Massachusetts and District of Columbia bars.

History of Immunity Statutes

In 1857 Congress, plagued in its investigation of government corruption by devotees of the Fifth Amendment, passed the first Federal immunity statute. This law provided that witnesses who revealed their crimes would be rewarded by freedom from all Federal prosecution. Some of the same individuals who had concealed their crimes by invoking the ban on self-incrimination, now assured of immunity from prosecution, revealed shocking corruption and fraud in the government. Their crimes went unpunished as a reward for their cooperation with Congress.

These unanticipated "immunity baths" resulting from the 1857 law moved Congress in 1862 to amend the immunity statute so that witnesses would not be shielded from prosecution for the crimes they revealed but would merely be exempt from having their testimony before Congress used against them in subsequent criminal proceedings. The Supreme Court found the amended immunity statute not to be co-extensive with the Fifth Amendment guarantee that no one shall be compelled to testify against himself. The Court hinted to Congress, however, that a statute which afforded ". . . immunity against future prosecution for the offence to which the question relates" would be an acceptable and constitutional substitute for the right against self-incrimination.

Not until 1896 was the Supreme Court obliged to decide on a statute offering absolute immunity in return for the confession of crimes. In the case of *Brown v. Walker* the highest tribunal of the land, in a 5-4 decision, ruled that, while the right not to incriminate oneself "is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity" from prosecution. The fact that the witness, compelled to reveal his crime, is publicly self-defamed was held not to invalidate an act of general amnesty on the part of Congress. The object of the Fifth Amendment, the Court ruled, is to prevent a person from being convicted on his own self-accusation. If the possibility of conviction is removed the self-accusation can be compelled.

The dissent, in which the learned Catholic Justice Edward Douglass White joined, took a far broader view of the scope of the right against self-incrimination. The words of the Constitution, the dissent noted, declare without qualification that no person shall "be compelled in any criminal case to be a witness against himself." Legislation cannot detract from the privilege afforded by the Constitution. The founders of our institutions disclosed their intention of placing the right against self-incrimination beyond any legislative attack or abridgement when they put this privilege in the Bill of Rights. Congress may not offer what it considers a substitute for one of the rights guaranteed in the Federal constitution. Furthermore, the dissent went on, it is doubtful whether an immunity statute can really be coterminous with the right to silence assured to all by the Fifth Amendment. Despite an immunity statute a witness

may be called upon to defend himself against a charge of perjury or any other accusation not derived, in the government's opinion, from the coerced testimony but in fact the remote fruit of this compelled disclosure.

Moreover, the constitutional privilege, as dissenting Justice Shiras insisted:

> . . . was intended as a shield for the innocent as well as the guilty. A moment's thought will show that a perfectly innocent person may expose himself to accusation, and even condemnation, by being compelled to disclose facts and circumstances known only to himself but which, when once disclosed, he may be entirely unable to explain as consistent with innocence.

Justice Field, dissenting separately, stated that the Fifth Amendment confers "the shield of absolute silence." No congressional substitute for this right can be a complete substitute, since the Fifth Amendment prevents public self-defamation whereas an immunity statute compels a self-disclosure of a defamatory nature. Congress has abrogated the constitutional privilege, Justice Field asserted, adding that "the essential and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone." Congress, he concluded, may not pardon an individual; this power resides exclusively in the President.

Immunity Grants Multiply

Fortified by the ruling in *Brown v. Walker*, Congress has through the years enacted over twenty immunity statutes available to witnesses obliged to testify before various governmental commissions and agencies. However, no such immunity statute was ever passed for the use of Congressional committees in their investigatory work. Obstinate witnesses frustrated Congressmen until finally Congress enacted the immunity statute of August 20, 1954.

Under this law, unique in our history, a committee of Congress may go to a Federal Court and request a grant of immunity. The Attorney-General is given the opportunity to be heard before Congress may immunize any witness from prosecution. Any witness compelled to testify about subversive activities shall not "be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled . . . to testify".

Right to Silence or Freedom from Prosecution?

On November 3, 1954 William L. Ullmann, a former Treasury Department official named by Elizabeth Bentley as a member of a wartime espionage ring, was asked before a Federal grand jury to answer certain questions about his alleged activities and associations. He refused to answer, invoking the Fifth Amendment. When he was offered immunity from prosecution under the Act of August, 1954, Mr. Ullmann still refused, stating that the immunity

statute abridged the Constitution. His sentence of six months for contempt brought forth the Supreme Court decision of March 26, a decision which without doubt ushers in a new era in the struggle against treason in our midst.

The Ullmann decision, written by Mr. Justice Frankfurter, follows and explicitly affirms *Brown v. Walker.* The Fifth Amendment guarantees only the right not to be sent to prison as a result of one's own compelled self-accusation. If the threat of prosecution is removed the state has a right to every man's evidence. When Congress removes the possibility of Federal or state prosecution from the witnesses whom it immunizes, they may not complain that they have received something less than the guarantee of the Fifth Amendment. Such is the present position of the law on self-incrimination.

The Court's majority view in the Ullmann decision was in a sense inevitable, since England, Canada and most of our States have for decades exchanged pardon from prosecution for incriminating information. Immunity statutes have been sustained by the Supreme Court on many occasions and in opinions written, among others, by Holmes and Brandeis. To have overturned all the well-settled law on immunity statutes would indeed have been a revolution. But the widespread misgivings about immunity statutes might have received more consideration in the Ullmann ruling. The decision is grounded in precedent, and good precedent at that, but it leaves unsolved and almost unmentioned some troublesome differences between the ordinary immunity statutes and the statute sustained. These differences dissenting Justice Douglas discusses in a rather convincing way.*

Once a person in our society has confessed that he was or is a Communist, life can never be quite the same for him. If he is a lawyer, he may be disbarred; if a teacher, he may be subject to suspension; if an alien, he may be deported. Other disabilities which attach to a person who is a Communist include ineligibility for Federal employment and disqualification for a passport. These are civil penalties and hence are not covered by the immunity from criminal penalties granted in the newly validated Compulsory Testimony Act. In view of these facts Justice Douglas asserts: "Congress has granted far less than it has taken away." The majority of the

---

*"It is certainly the function of Congressmen to make whatever investigations may be necessary to the proper performance of their duty as legislators. They are entitled to question anyone from whom they have reason to expect helpful information. Our purpose has been merely to show that there are also other rights which may be legitimately pursued. The right to proof will at times yield to the right to silence. It may well be that the undeserving will hide behind this right of silence. It may even be that those who are invoking it today are doing so in behalf of a system which would destroy it. It would indeed be a catastrophe if such people should eventually succeed in destroying the right which is now protecting them. But it would be a greater catastrophe if we should destroy it ourselves."

Rev. John R. Connery, S.J., professor of moral theology, West Baden College, West Baden Springs, Indiana, in Marquette Law Review, *Winter, 1955-56.*

Court, in his view, has ratified a serious qualification to the Fifth Amendment and has created uncertainties which will plague the Court and the public in future litigation.

Communists, Ex-Communists and the Innocent

Future litigants under the Compulsory Testimony Act are likely to fall into three classes. In the first will be the unrepentant and convinced Communist who will be rewarded by the government by immunity from prosecution in exchange for revelations of his crimes against national security. Such cases, let us hope, will be rare, since the activities of the professional Communists are presumably known to the authorities.

The second class will be made up of ex-Communists who, now repentant, seek to conceal their former treason. They are now without a defense in the face of a vigorous investigation armed with an immunity statute.

The last class is that of the misguided citizens who once guilelessly joined a Leftist front because they believed in Negro rights, or wanted to oppose Fascism. These have probably not committed any crime, and hence have a right to invoke the Fifth Amendment only if it is necessary to prevent the revelation of circumstances which might *tend* to incriminate. The immunity statute may be a benefit to some honest citizens in this group who desire to aid their government by supplying information without, however, being subject to the threat of prosecution.

The fate of the first group, the true Communists, is not particularly shocking. If an unrepentant traitor is given immunity from Federal and State criminal prosecution in exchange for a confession of his subversive activities, he has probably received more than he deserves. One may lament that he is forced to confess, but his confession greatly profits him.

The future of the third group—misguided but innocent former members of Communist fronts—may be improved or worsened by the immunity statute. But at most the now more easily compellable confessions of this group will serve only to reveal their former intellectual confusion and the indiscretion of their less mature years. It is doubtful, moreover, whether any civil penalties will attach to the innocent ex-member of a Communist front.

The new position of the second group—the repentant ex-Communists—however, gives one pause. The members of this class were or are indictable. If they are still indictable they may, if they so desire, publicly confess their crimes and hope that their sincerity will merit the gratuity of amnesty. If they are not now subject to indictment they may reveal their subversive activities without criminal penalty. But such a course of action brings angry reprisals, defames others, and projects one into public life in a way personally undesirable and damaging to many individuals. The role of militant ex-Communists may be admirable and heroic at times, but it cannot

be said to be the moral obligation of all ex-Communists. Treason, like mankind's other crimes, need not always be confessed from the house tops.

Under the Compulsory Testimony Act the ex-Communists who desire to conceal their crime may now have it self-revealed for the eyes and ears of the world. Their crime may be known only to a few members of the Party. Perhaps in fact they assumed a false name in that organization. Yet these hidden and repented crimes are now the possible subject of compelled self-revelation. Should the State be able to compel the public confession of hidden and repented crimes? Perhaps no crime of treason can be completely occult, but sound morality suggests that the public revelation of hidden and repented crimes should not be compelled unless the good to be achieved outweighs the serious evil inevitably to follow. The privilege of silence should extend at least to this one case.

Need for Restraint

What is the good to be achieved from the compelled testimony of ex-Communists? The Government obtains from them information valuable in its search for subversives. But the evil which follows is a serious blow to the reputation of the witness who, deprived of the Fifth Amendment, is obliged to reveal his crimes. Cannot some method be devised by which the diffusion of compelled self-defamatory testimony could be limited? The Compulsory Testimony Act unfortunately provides no such remedy; we may therefore expect that it will be used to denigrate the character of witnesses whose testimony, we will be told, is indispensable for the safety of the nation. A new phase and indeed a new era in the history of congressional investigations may be opening before us. This is but another reason for the urgency of a code of fair play in Senate and House investigations. That code should allow the publication of defamation —especially compelled self-defamation—only if national security would otherwise be substantially endangered. In our anxiety to protect ourselves against treason in our midst let us not forget that ex-criminals and even ex-traitors have a right to our compassion and our love.

Perhaps it is not out of place to remark that Christ never once before His Passion even hinted to the apostles about the perfidy of the greatest traitor of all time. Even traitors—and, much more, repentant ex-traitors—have a right not to be needlessly defamed.

Editorial Note

In support of Father Drinan's approach we remind our readers that the 12th article of the Massachusetts Bill of Rights adopted in 1780 for the same purpose eight years or more before the Fifth Amendment is more specifically explanatory of the right to silence.

It provides that no one shall be "compelled to accuse or furnish evidence against himself." Anyone interested should read the Massachusetts Court's opinions under that article in Emery's case, 107 Mass. 172 (in 1871), Commonwealth v. Prince, 313 Mass. 223 (in 1942), and Jones v. Commonwealth, 327 Mass. 491 (in 1951). See also, 39 Mass. Law Quarterly No. 2, for June, 1954, pp. 51-55 where those cases are discussed. F. W. G.

(Continued from Page 22)

an administrative commission with a fixed scale of damages for various injuries, as was done in the case of industrial accidents in Massachusetts in 1912. At the request of the legislature in our last report filed in December, 1932, we discussed at length the various proposals for the creation of administrative commissions for this purpose and recommended that such a course should not be adopted (See Eighth Report, pp. 22-35).

"We do not believe that we have yet exhausted the capacity of our judicial system for dealing with these problems more effectively, more promptly and with less expense. Until we have tried all the reasonable experiments of more effective action which the judicial system offers, we do not believe in transferring judicial business to any more administrative tribunals. But in order to discover the capacity of the courts in practice, an effort must be made to adjust the courts and their methods of operation to the facts."

The revival of pre-war conditions and discussions of court administration throughout the country, has also revived the proposals for "Compensation" plans. Last fall the Saturday Evening Post carried an article by Judge Hofstadter of New York in favor of the Compensation plan. The February A. B. A. Journal (p. 117) carried a vigorous article against it by Messrs. Ryan and Greene of the New York Bar and the May Journal (p. 421) contains a vigorous reply by Robert S. Marx of the Ohio Bar.

We attended a conference in Washington on May 21st and 22nd, of bar representatives of 36 States, called by the Attorney General to consider problems of court administrations in the Federal Courts.

Perhaps, if the bench and bar realize more fully than they appear to, that they are in competition with other public agencies and with the private arbitration movement as pointed out in Judge Peck's address the fact of competition may prove as stimulating inside of a court house as it is outside and help to keep judicial business in the courts.

The successful Berkshire "Conciliation" practice may be worth study by the bar of other counties or the forgotten act of 1929 (now G. L. Chapter 231, Section 60A) for arbitration IN COURT recommended by the Judicial Council in its 4th report for reason's there stated (see 14 M. L. 2. No. 3 December, 1928 pp. 22-23).

F. W. G.

THE SCHOOL SEGREGATION OPINION—WHAT AND WHY IS "INTERPOSITION"? IS THERE A "LIMIT OF EFFECTIVE LEGAL ACTION"?

About 30 years ago Dean Pound used the phrase—"the limit of effective legal action." We have never forgotten it in looking at law, or attempted law, whether in the form of a constitutional provision, legislation or judicial decision.

Does "the limit" apply to the school segregation opinion? Is it, or will it prove to be, enforceable, except in scattered parts of the nation? Is it possible to control and enforce the intangibles of life by litigation and, if so, to what extent? Do attempts at enforcement open a Pandora's box of insufficiently considered evils, as happened during the prohibition experiment?

As stated in the A.B.A. Journal for April, 1956:

> "Probably no decisions of the Supreme Court" since the Dred Scott Case (in 1857) has provoked so much public discussion, excitement, even disorder."

For this reason it carried articles on both sides. The "U. S. News and World Report" of May 15th, 1956 carried a powerful article by Governor Byrnes of South Carolina (a former member of the Court) explaining the problems facing that state. About 100 members of Congress signed a "manifesto" against the court's decision and a number of states have adopted resolutions of "Interposition." The meaning of this word is explained and studied and repeated examples of it in our history shown in an exceptionally able and interesting article by Fred G. Hudson, Jr. of the Louisiana Bar in the Louisiana Bar Journal for April, 1956 under the title "One Lawyer Looks at Interposition." He states and discusses opposing views as he sees them.

We believe you will learn something interesting and important if you can get a copy and read it. It is published by the Louisiana State Bar Association, International Bldg., New Orleans 12, La. (Stephen A. Mascaro, Executive Secretary).

We have received the following announcement from the Vanderbilt University School of Law of a new periodical which may be needed by lawyers as a unique source of information not available elsewhere.

F. W. G.

RACE RELATIONS LAW REPORTER
VANDERBILT UNIVERSITY

Nashville 5, Tennessee

Dear Sir:

The Supreme Court's decisions in the Racial Segregation Cases have ramifications that are varied and complex. Many resulting legal developments are being embodied in the decisions and orders of state and lower federal courts, in legislative enactments, and in

executive and administrative rulings and regulations. Apart from these, and throughout the country, the issue of race or color is being injected frequently into a great variety of legal proceedings.

Lawyers and members of many other concerned groups will require adequate information in this area. You have undoubtedly recognized the need to have available a comprehensive, accurate, and up-to-date source of the important materials in this rapidly-changing field.

The Vanderbilt University School of Law is now publishing the RACE RELATIONS LAW REPORTER, devoted to the impartial bringing together of professional materials relating to racial segregation. Although the public school situation will be the area of concentration, materials on other phases, such as transportation, housing, recreation, employment, elections and court procedure will be included.

The RACE RELATIONS LAW REPORTER will collect and publish the primary legal materials:

Decisions and orders of the courts.
Provisions of state constitutions.
Enactments of Congress and state legislatures.
Ordinances of municipalities.
Regulations of state departments of education.
Rulings of local boards of education.
Opinions of attorneys-general.

The decisions, opinions, and order in local courts and boards will provide materials frequently unavailable from other sources. Background studies and references to current legal literature will also be included.

A foundation grant permits us to offer you this service for a full year—six issues—for only $2. Every effort will be devoted to bringing you an objective, comprehensive and competent reporting service in this important field.

Very truly yours,
Paul H. Sanders, Director

(Reprint, page one, first issue, RACE RELATIONS LAW REPORTER*)*

BY WAY OF INTRODUCTION . . .

So many words have been written in the decidedly active field of race relations that anyone who would add more must necessarily assume responsibility for contributing to betterment or aggravation of the present situation. The Vanderbilt University School of Law is undertaking the publication of the RACE RELATIONS LAW REPORTER in the belief that constructive developments in this field, as in others, should be based on accurate and complete information regarding authoritative legal materials. Regardless of differences in points of view there is widespread recognition among lawyers, educators and others of the need for a systematic compilation of primary materials in this rapidly developing field of law. The RACE RELATIONS

LAW REPORTER is undertaking to provide these materials on a professional basis. It proposes to be objective and impartial in all respects.

Through this publication the Vanderbilt University School of Law will endeavor to report the materials in all fields where the issue of race or color is presented as having legal consequence. Primary emphasis, however, will be placed on public education and other related fields directly affected by the United States Supreme Court decisions in the Segregation Cases. This coverage will include decisions of the United States Supreme Court, the lower federal courts, and the various state courts; legislation enacted or officially proposed; rulings and orders of administrative agencies, boards and commissions; and opinions of state attorneys-general. Unreported decisions of lower courts will be printed whenever obtainable and representative municipal ordinances will be included in the legislative section.

This first issue of the RACE RELATIONS LAW REPORTER is unsually large because of the decision to begin current reporting with the School Segregation Cases in May, 1954. The issue is covering legal developments over more than a year and a half, whereas the normal issue coverage will span a two-month period. The general outline of the material should be readily apparent from the detailed Table of Contents which follows on the next two pages. The Summary of Recent Developments, page 4, will be a regular feature in subsequent issues. Its usefulness should be greater when it attempts to cover only a two-month period and can make more adequate reference to the specific materials contained in the issue.

By far the major portion of the content of the RACE RELATIONS LAW REPORTER will consist of the actual wording of decisions, rulings, and legislative enactments. The Board of Editors prepares the case summaries and the bracketed sub-heads inserted occasionally in longer opinions. Some of the material has been abridged, and in certain instances merely summarized. Except as indicated, original wording attributable to the editorial staff will appear in the Reference Section only. In this issue, for instance, the Section contains a background study collecting the cases on the topic "Separate But Equal: A Study in the Career of a Constitutional Concept." In subsequent issues the Reference Section will contain similar studies dealing with important legal problems, both substantive and procedural, associated with the various aspects of race relations law. (Examples: The Concept of State Action; The Doctrine of Interposition; Class Suits; Exhaustion of Administrative Remedies.) Bibliographies and other legal and general reference materials will be presented regularly in this section.

A generous grant from The Fund for the Republic, Inc., makes it possible for the Vanderbilt University School of Law to publish this material at a relatively low subscription price. Complete responsibility for the contents of the magazine, however, including editorial

policy in general, lies with the Vanderbilt University School of Law and particularly with those members of its regular staff who are working on this publication. We sincerely believe that a useful service will be performed through this medium. The usefulness of the RACE RELATIONS LAW REPORTER, however, may be greatly increased if readers will send information regarding material which should appear in its columns and make suggestions freely concerning the contents of the publication.

John W. Wade, Dean
Vanderbilt University School of Law

MISCELLANEOUS NEWS

The Distribution of Admiral Morison's Address on "The Formation of the Massachusetts Constitution"

This important contribution to the literature of Massachusetts and American history, was delivered at the Massachusetts Heritage dinner on October 25, 1956, the 175th anniversary of the Constitution and of the inauguration of John Hancock as the first constitutional governor on October 25th, 1780. It was printed in full in the "Quarterly" for December, 1956.

A grant from the Fund for the Republic enabled us to send reprints of the address to all the colleges and principal libraries in the nation.

A contribution from another fund enabled us to supply all the schools in Massachusetts with copies for use in their history teaching.

The 1955 Annual Survey of Massachusetts Law

We call special attention to the appearance of this second annual volume, edited by William J. Curran, issued by the Boston College Law School and published by Little-Brown. For an account of the book and list of contributors to its contents, see page 2 of this issue.

XU

E. L. GRIMES PRINTING CO., BOSTON, MASS.